Supreme Court, U.S.
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In The
Supreme Court of the United States

CLIFTON MALLERY A/K/A ENJAI OMAA EELE,
AMNAU KARAM EELE,
Petitioners,

v.

NBC UNIVERSAL, INC., NBC UNIVERSAL TELEVISION STUDIO, TAIL WIND PRODUCTIONS, TIM KRING, DENNIS HAMMER, ALLAN ARKUSH, JEPH LOEB, BRYAN FULLER,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

CLIFTON MALLERY A/K/A
ENJAI OMAA EELE
AMNAU KARAM EELE
P.O. Box 20474
NEW YORK, NY 10011
212-330-7137
celetwins10102002@yahoo.com

Petitioners pro se

January 2010

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

The United States Court of Appeals for the Second Circuit affirmed the United States District Court for the Southern District of New York summary judgment without notice entered in favor of respondents in the case of Clifton Mallery a/k/a Enjai Omaa Eele and Amnau Karam Eele - Petitioners v. NBC Universal, Inc., NBC Universal Television Studio, Tailwind Productions, Tim Kring, Dennis Hammer, Allen Arkush, Jeph Loeb and Bryan Fuller – Respondents.

This case arises out of the claim of copyright infringement filed March 17, 2007 by the petitioners under the Copyright Act of 1976, 17 U.S.C. 101 et seq., action pursuant to 28 U.S.C. 1331 and 1338(a), judicial district pursuant to 28 U.S.C. 1391(b) and (c) against the respondents. The petitioners oppose the summary judgment without notice in this case because the United States Second Circuit Court of Appeals has entered a decision in conflict with the decision of the United States Ninth Circuit Court of Appeals (Twentieth Century Fox v. MCA, Inc., 715 F.2d 1327 (9th Cir. 1983)) and the United States Sixth Circuit Court of Appeals (Bridgeport Music, Inc., and Southfield Music, Inc. v. UMG Recordings, Inc., and Universal Music Investments, Inc., No. 07-5596 (6th Cir. Nov. 4, 2009)) on the same important matter.

The petitioners were not afforded full faith and credit of Federal Rules of Civil Procedure (Rule 26-37). The respondents have not provided exhibits proving originality of their intellectual property, no clearance domain which is needed by a network like NBC to obtain an Error & Omission Insurance policy which is needed by law to air a TV show like "Heroes" and

distribution of any Heroes products, toys etc ... The widespread infringement of copyrights permitted by the decision in this case undermines the entire system of copyrights protection, author originality which is required by copyright law, injures content distributors who respect the copyright laws and contradicts the "fair use" and Lanham Act. 15 U.S.C. 1125(a), Section 43(a); Taylor v. Carpenter, 23 F. Cas. 742, 744 (C.C.D. Mass. 1844); 15 U.S.C. 1114; Paul Heald, Federal Intellectual Property Law and the Economics of Preemption, 76 Iowa L. Rev. 959, 1002-03 (1991). The court should find respondents subject to severe liability for widespread violation of the copyright laws and should not be allowed to set a precedent with this case as a matter of law.

Three questions are presented:

1. Should the Lower District and Appeals Courts have the lawful right to set a precedent as a matter of law when the petitioners received no due diligence, no due process, no pre-trial conference, by contrast to mis-represention of first impressions and holdings?

2. If genuine issues of Material Fact exist will the moving party be entitled to prevail and granted a summary judgment without notice as a matter of law? Boone v. Mechanical Specialities Co., 609 F.2d 956, 959 (9th Cir. 1979) under rule 56(c); British Airways Bd. v. Boeing Co., 585 F.2d 946, 951 No.6 (9th Cir. 1978), cert. denied, 440 U.S. 981, 99 S. Ct. 1790, 60 L. Ed. 2d 241 (1979); Fed. R. Civ. P. 56(c); First Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253 (1968).

3. Is summary judgment without notice appropriate as a matter of law when the record is

replete with facts that should have been presented to a jury, the respondent Tim Kring does an admission of guilt in the media and an admission to access and copying the petitioners' copyrighted intellectual property by an NBC representative attending petitioners' show at Hunter College on April 22, 2005 as stated on page 13 of the oral argument held in the United States Court of Appeals for the Second Circuit on May 19, 2009?

TABLE OF CONTENTS

Questions Presented i

Table of Contents iv

Table of Appendices v

Table of Cited Authorities viii

Opinions Below 1

Statement of Jurisdiction 1

Relevant Provisions Involved 1

Statement of the Case 3

Reasons for Granting the Petition 10

Conclusion 20

TABLE OF APPENDICES

Appendix A – Summary Order of the United States Court of Appeals for the Second Circuit filed June 3, 2009 1a

Appendix B – Judgment on Attorneys Fees of the United States District Court for the Southern District of New York filed April 11, 2008 . . . . . 7a

Appendix C – Memorandum Opinion and Order of the United States District Court for the Southern District of New York filed March 18, 2008 . . . . . 9a

Appendix D – Judgment of the United States District Court for the Southern District of New York filed February 22, 2008 . . . . . 16a

Appendix E – Memorandum Opinion and Order of the United States District Court for the Southern District of New York filed February, 2008 . . . . 18a

Appendix F – Opinion and Order of the United States District Court for the Southern District of New York filed December 3, 2007 . . . . . 21a

Appendix G – Order of United States Court of Appeals for the Second Circuit Denying Petition for Rehearing En Banc filed August 19, 2009 . . . 41a

Appendix H – Example of side by side visual substantial similarity of NYC artist Enjai Eele a/k/a Idai Markus in his studio vs respondents NBC Heroes pilot script of NYC artist Isaac Mendez in his art studio <http://www.dbuu.com/scan02.pdf> 43a

Appendix I – Example of side by side visual substantial similarity of cover of petitioners' script vs respondents' NBC Heroes script cover 44a

Appendix J – Example of side by side visual substantial similarity of petitioner Enjai Eele's painting titled: "Twice" and respondents' NBC Heroes Issac Mendez painting . 45a

Appendix K – J. Zamgba Browne, "Couple to appeal verdict in infringement suit against NBC-TV unit," New York Beacon, Sept. 17-23, 2009 .... 46a

Appendix L – E-mail from John A. Coleman, Jr. to Marcia Paul (Dec. 17, 2007 1:05:26 PM EST (The Twins declined settlement of attorney fees) 52a

Appendix M – Excerpt from Brief of Defendants-appellees (Respondents admit that petitioners copyrighted IP and character Idai Marks the Artist

that can Paint the Future on large canvas in NYC is original) 53a

Appendix N – Transcript Excerpt (Respondents admit to "accessing and copying" petitioners' original and fully developed IP) 54a

Appendix O – websites (http://blog.the-eg.com/2007/12/04/tim-kring, http://lwww.fastcompany.com/magazine/125/rebel-alliance.html) 56a

TABLE OF CITED AUTHORITIES

Cases

Anderson v. Liberty Lobby Inc.,
477 U.S. 242, 106 S. Ct 2505, 91 L. Ed. 2d 202
(1986) 5, 10

Baxter v. MCA, Inc.,
812 F.2d 421 (9th Cir. 1987) 16

Boone v. Mechanical Specialities Co.,
609 F.2d 956 (9th Cir. 1979) ..... ii, 7

Bridgeport Inc., v. Dimension Films,
410 F.3d 792 (6th Cir. 2005) 16

Bridgeport Music, Inc., and Southfield Music, Inc. v. UMG Recordings, Inc., and Universal Music Investments, Inc.,
No. 07-5596 (6th Cir. Nov. 4,
2009) 1, 12, 13, 15, 16

British Airways Bd. v. Boeing Co.,
585 F.2d 946 (9th Cir. 1978), *cert. denied*, 440
U.S. 981, 99 S. Ct 1790 60, L. Ed 2d 241
(1979) ..... ii, 7

Campbell v. Acuff-Rose Music Inc.,
510 U.S. 569 (1994) 12, 13

Castle Rock Entm't, Inc. v. Carol Pub'g Group, Inc.,
150 F.3d 132 (2d Cir. 1998) 11

First Nat'l Bank of Ariz. v. Cities Serv. Co.,
391 U.S. 253, 88 S. Ct. 1575, 20 L. Ed. 2d 569
(1968) . . . . . ii, 7

Hein v. Universal Pictures Co.,
154 F. 2d 480 (2d Cir. 1946) 16

Hoehling v. Universal City Studios, Inc.,
618 F. 2d 972 (2d Cir. 1980) 8

Murray Hill v. Twentieth Century Fox,
361 F.3d 312 (2004) 15

Murray Hill Publ'ns Inc. v. ABC Commc'ns, Inc.,
264 F.3d 622 (6th Cir. 2001) 16

N.Y. Times Co. v. Tasini,
533 U.S. 483 (2001) 17

Peter Pan Fabrics, Inc. v Dan River Mills, Inc.,
295 F. Supp. 1366 (2d Cir. 1969) 8

Positive Black Talk, Inc. v. Cash Money Records Inc.,
394 F.3d 357 (5th Cir. 2004) 16

Princeton Univ. Press v. Mich. Doc. Servs., Inc.,
99 F.3d 1381 (6th Cir. 1996) 11

Rose v. Connely,
38 F. Supp. 54 (S.D.N.Y. 1941) 8

Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.,
562 F.2d 1157 (9th Cir. 1977) 8

Taylor v. Carpenter,
23 F. Cas. 742 (C.C.D. Mass. 1844) ii

Twentieth Century-Fox Film Corp. v. MCA., Inc.,
715 F.2d 1327 (9th Cir. 1983) . . . . . i, 6, 7

Williams v. Crichton,
84 F.3d 581 (2d Cir. 1996) 15

Constitutional Provisions

U.S. Const. art. IV, § 1 2

Statutes

15 U.S.C. 1114 ii
15 U.S.C. 1125 (a) . . . . . i, ii
17 U.S.C. 101 et. seq., ... 1
17 U.S.C. 107 . . . . . 12, 13
17 U.S.C. 501 1
18 U.S.C. 1343 19
28 U.S.C. 1291 1
28 U.S.C. 1331 and 1338(a) . . . . . i, 1
28 U.S.C. 1391(b) and (c) i
28 U.S.C. 1652 2

Rules

Fed. R. Civ. P. 26-37 i
Fed. R. Civ. P. 56 . . . . . 5, 10
Fed. R. Civ. P. 56(c) . . . . . ii, 1, 7

Other Authorities

Paul Heald, Federal Intellectual Property Law and the Economics of Preemption, 76 Iowa L. Rev. 959, 1002-03 (1991) ii

http://blog.the-eg.com/2007/12/04/tim-kring/ 19

http://www.fastcompany.com/magazine/125/rebel-alliance.html 20

http://www.therealheroes.blogspot.com/2006/10/mission-5- 17

http://youtube.com/ 17

Merriam-Webster Dictionary 18

Melville B. Nimmer & David Nimmer, Nimmer on Copyright (rev. ed 2009) 11, 16

OPINIONS BELOW

The Order of the United States Court of Appeals for the Second Circuit dated and decided June 3, 2009 appears at Appendix A, 1a.

The Opinion and Order of the United States District Court for the Southern District of New York dated and decided December 3, 2007 appears at Appendix F, 21a.

The Order of the United States Court of Appeals for the Second Circuit Denying Petition for Rehearing En Banc dated August 19, 2009 appears at Appendix G, 41a.

STATEMENT OF JURISDICTION

The District Court had federal question jurisdiction under the Copyright Act. 17 U.S.C. 501; 28 U.S.C. 1331, 1338(a). This Court has Appellate jurisdiction of the District Court's April 11, 2008 final order under 28 U.S.C. 1291 and petitioners' May 6, 2008 Notice of Appeal. And Denying Petition for Rehearing En Banc August 19, 2009, mandated September 2, 2009.

RELEVANT PROVISIONS INVOLVED

Fed. R. Civ. P. 56. Summary Judgment

* * *

(c) SERVING THE MOTION; PROCEEDINGS. The motion must be served at least 10 days before the day set for the hearing. An opposing party may serve opposing affidavits before the

> hearing day. The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.
>
> * * *

U.S. Const. art. IV, § 1:

> Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

28 U.S.C. 1652 (State laws as rules of decisions):

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

The Judgment in this case should not be rendered if the pleadings, the discovery and full disclosure of materials on file would have been viewed and analyzed in a side by side comparison etc. to show that there is genuine issue as to any material fact and that full faith and credit shall be given in regard to rules of decision in civil actions in the courts of the United States, in cases where they apply.

STATEMENT OF THE CASE

Petitioners Clifton Mallery a/k/a Enjai Omaa Eele and Amnau Karam Eele assert in this case (Mallery v. NBC) that the respondents NBC Universal, Tailwind Productions, Tim Kring etc. all have infringed the petitioners' "original, unique, pioneering, complex, fully developed" character expression and copyrighted intellectual property and their exclusive rights to create derivative works.

On April 22, 2005 the students of the art department at Hunter College NYC gave the petitioner Clifton Mallery a/k/a Enjai Omaa Eele the real life artist that can paint the future on large canvas before it happens an art exhibit and film screening based on his rare artistic abilities and the fictional character he and the petitioner Amnau Eele created: Idai Markus the New York City African American drug free artist that can paint the future on canvas before it happens and validate the predicted event with newspaper clippings. The petitioners' show at Hunter College were attended by several representatives from NBC including respondent Bryan Fuller. The NBC representatives took the petitioners' copyrighted IP that was available for the Hunter College students as a study guide and went back to Hollywood and created the character: Issac Mendez the New York City drug addicted Latino artist that can paint the future on canvas before it happens and validate the predicted event with newspaper clippings, which premiered on the TV show "Heroes" on September 26, 2006. The petitioners retained a lawyer to file a letter of complaint to NBC to politely inform NBC that NBC etc.al <http://etc.al/> were using the petitioners' character storylines, concepts and copyrighted

expressions from the petitioners' copyrighted IP titled: "The Twins – Journey of The Soul" copyrighted 2001 with short film excerpt titled: "The Letter" copyrighted 2004.

The petitioners retained the service of another attorney, John Coleman of Freidberg Cohen Coleman & Pinkas, LLP and a complaint was filed against the respondents March 17, 2007. After 2 months of the petitioners' lawyer's reluctance to request or submit documents to dispute false and deceitful claims by the respondents' attorney Marcia Paul, the petitioners retained the services of an additional law firm Gersten Savage, LLP to arrange a face to face meeting with respondents' attorney Marcia Paul of Davis Wright Tremaine, LLP.

On May 17, 2007 petitioners met respondents' attorney Marcia Paul at the law firm of Gerston Savage LLP. Proof of access, copying and similarities between the two works were presented by attorney Robert Wolf of Gersten Savage, LLP. The respondents' attorney Marcia Paul made a settlement offer of $750,000.00 plus 5% net royalty. Settlement offer was declined by the petitioners. Assessment of true value of infringement claim requested by petitioners.

Attorney Marcia Paul filed a motion to dismiss in the United States District Court for the Southern District of New York on June 15, 2007. There was no deposition from the respondents presented or requested by either counsel, no original notes or notes process to prove originality by the respondents, no clearance domain documents or Error & Omission insurance policy documents to confirm any rights of "fair use," no full disclosure or full discovery and the

full exhaustion of legal remedies afforded to the petitioners pre-trial.

By contrast, communication by e-mail and telephone conference between counsel for the petitioners John A. Coleman and counsel for the respondents Marcia Paul, communication between counsel for the respondents and Judge Cote's chambers and clerk that resulted in a limitation on petitioners' ability to present documents and exhibits in a comprehensive form to give merit to the infringement claim allowing the counsel for the respondents Marcia Paul to mis-represent the first impression and holdings of this case.

There was no pre-trial conference. Procedurally the district court should not have entered summary judgment pursuant to Rule 56 "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby Inc., 477 U.S. 242, 106 S. Ct 2505, 91 L. Ed. 2d 202 (1986). The inquiry performed is the threshold inquiry of determining whether there is the need for a trial – whether there are any genuine factual issues that properly can be resolved only by finder of fact because they may reasonably be resolved in favor of either party.

Taking the facts most favorable to petitioners, Clifton Mallery a/k/a Enjai Omaa Eele is the only and first artist in New York City or the United States to make the claim of the artist who can paint the future on canvas before it happens, validate the predicted event with newspaper clippings and to have painted a catastrophe of two landmark buildings in New York before it happened. The character Idai Markus is the

first fictional character with this unique ability to paint the future created by the petitioners. Comparing Idai Markus with the infringed character Issac Mendez of "Heroes," there is no question that reasonable juries could find that the respondents infringed the storyline and expression of the character created by the petitioners. The petitioners reserve the exclusive rights to usage and protection of their intellectual property.

1. When comparing the first of many similarities, a photo of the original artist next to a painting on canvas of a catastrophe of two New York City landmark buildings in his studio and a drawing from "Heroes" pilot script of the infringed image of an artist next to a painting on wall of a catastrophe of two New York City landmark buildings in his studio appears at Appendix - H and I, 43a, 44a. Taking facts most favorable to the non-moving party there should be no question of genuine issues that there is the need for a trial. The petitioners are the original and the first to create the character who can paint the future. etc., published in 2001 One World Magazine - 2004 New York Daily News - 2005 The Envoy Hunter College NYC. The respondents admitted to producing the infringed work in Oct.-Nov. 2005, and used the artist that can paint the future and artwork in pilot script as a sale device to pitch "Heroes" to NBC network.

A summary judgment without notice by Judge Denise Cote was decided December 3, 2007. This summary judgment is in conflict with the Ninth Circuit Court decision, Twentieth Century Fox v. MCA, Inc. In both cases (Mallery v. NBC and Fox v. MCA, Inc.) the issue raised in the motion was whether defendants' production was so dissimilar to plaintiffs'

works, as to both ideas and expression of those ideas, that no material issue of fact existed on the question of substantial similarity, and the question could be decided as a matter of law. The trial court granted defendants' motion for summary judgment. In Fox v. MCA, Inc., Fox argued in its brief that a comparison of the two works discloses at least 34 similarities. In Mallery v. NBC, plaintiffs argued in its brief that a comparison of the two works discloses at least 23 similarities.

In June, 1978, Fox commenced this action against MCA, Universal, and ABC, alleging copyright infringement. Defendants moved for partial summary judgment on the copyright claims. In connection with that motion, the trial judge reviewed the Star Wars film and book, and a videotape of the first television episode of Battlestar. Defendants did not contest the validity of plaintiffs' Star Wars copyrights. Further, for purposes of the motion, defendants admitted access to plaintiffs' works. The law relating to a grant of summary judgment is clear. Only if no genuine issue of material fact exists will the moving party be entitled to prevail as a matter of law. Fed. R. Civ. P. 56(c); First Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 288-90, 88 S. Ct. 1575, 1592-93, 20 L. Ed. 2d 569 (1968).

On appeal, the question whether summary judgment was properly granted is one of law. Boone v. Mechanical Specialties Co., 609 F.2d 956, 959 (9th Cir. 1978). The standard governing our review is the same as that employed by the trial court under Rule 56(c). British Airways Bd. v. Boeing Co., 585 F.2d 946, 951 n.6 (9th Cir. 1978). That is, the court must view the evidence and inferences therefrom in the light most

favorable to the non-moving party, herein plaintiffs-appellants Fox and Lucasfilm. Defendants-appellees MCA, Inc. may prevail only if no genuine issue of material fact exists on the question of substantial similarity of idea and idea expression.

After viewing the Star Wars and Battlestar motion pictures, the court concluded that the films do in fact raise genuine issues of material fact as to whether only the Star Wars idea or the expression of that idea was copied. Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977). At a minimum, it is a close enough question that it should be resolved by way of a trial. The court intimated no opinion whether the films are substantially similar as to either idea or expression, but stated only that reasonable minds could differ on those key factual issues. Thus, a grant of summary judgment was improvident.

The court did not imply that summary judgment is never appropriate in copyright infringement actions. Summary judgment is appropriate, where undisputed facts raise a complete defense as a matter of law. Hoehling v. Universal City Studios, Inc., 618 F.2d 972, 977 (2d Cir. 1980). A grant of summary judgment for plaintiff is proper where works are so overwhelmingly identical that the possibility of independent creation is precluded. See Peter Pan Fabrics, Inc. v. Dan River Mills, Inc., 295 F. Supp. 1366, 1369 (2d Cir. 1969). Similarly, summary judgment for defendant is appropriate where works are so dissimilar that a claim of infringement is without merit. See Rose v. Connely, 38 F. Supp. 54, 55-56 (S.D.N.Y. 1941) (two plays differed substantially in plot, character interest, general purpose, and intent). This, however, is not

such a case. The court therefore reversed and remanded this case for trial.

After the summary judgment by Judge Cote December 3, 2007, ten days later the respondents' attorney Marcia Paul made another settlement offer through attorney John Coleman, counsel for the petitioners. "If petitioners drop the lawsuit and don't file an appeal, the respondents' law firm Davis Wright Tremaine, LLP would waive the $100,000.00 legal fees against the petitioners. The petitioners declined the offer. E-mail from John Coleman to Marcia Paul appears at Appendix - L, 52a.

Petitioners' attorney John Coleman refused and made two errors to file a Notice of Appeal on behalf of the petitioners, the petitioners filed Notice of Appeal pro se. The petitioners retained a lawyer Michael Confusione to represent the petitioners on appeal. Mr. Confusione filed briefs on petitioners' behalf. Respondents' counsel responded. An oral argument was held on May 19, 2009. The Appellate Court affirmed the lower court's decision. The petitioners filed a petition for rehearing en banc pro se and entered evidence on record to affirm the merit of infringement by the respondents. The evidence was ignored by the Second Circuit Court and a Petition for Re-Hearing En Banc and an Emergency Injunction by the petitioners were denied. The petitioners feel that there is sufficient evidence for this case to be reversed and remanded for trial.

REASONS FOR GRANTING THE PETITION

Under Fed. Rule Civ. P. 56, summary judgment can only be granted when there is no genuine issue of material fact.

It is clear enough from recent cases that at the summary judgment stage the Judge's function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. As (citation omitted) indicate, there is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The Judge must ask, not whether the evidence unmistakenly favors one side or the other but whether a fair minded jury could return a verdict for the plaintiffs on the evidence presented.

Respondents do not dispute that the petitioners' copyrighted character Idai Markus is fully developed, original, unique, complex and copyrighted. (See Page 32 of 53 Brief of defendants-appellees, at Appendix M, 53a)).

Respondents do not dispute that several NBC representatives including the respondent Bryan Fuller attended petitioners' art exhibit and film screening at Hunter College April 22, 2005. (Oral Argument page # 13, at Appendix N, 54a).

Respondents do not dispute that respondents "accessed and copied" petitioners' copyrighted IP to create the respondents' character Issac Mendez and the TV show "Heroes." A comparison discloses the

petitioners' work and the respondents' work are the only two in the TV or Film Industry history to have the same storyline of an artist who can paint the future on canvas before it happens, validate the predicted event with newspaper clippings, that lives in New York City and painted a catastrophe of two NYC landmark buildings before it happened and attempted to stop that event with the help of other supporting character storylines and 23 additional fragmented similarities or paraphrases. This is a unique storyline exclusive to its originator, the petitioners. A terrorist attack that happen twice in the history of New York City is not a common event that is a recurring scene a faire.

Respondent Tim Kring did an admission of guilt in the media. Tim Kring admitted to "tampering with the parameter of the intellectual property to create content for NBC" and respondent Tim Kring admits to "borrowing" to build "Heroes" and how "Heroes" is not the most original idea in the world. A Originality which is required by the copyright law.

The respondent initially struck an affirmative defense of "Fair Use" raised in the motion to dismiss. By contrast in the case of Bridgeport Music, Inc. v. UMG Inc., the doctrine of fair use operates to present the mechanistic enforcement of copyright law in a way that would work to repress creativity. See Princeton Univ. Press v. Mich. Doc. Servs., Inc., 99 F.3d 1381 (6th Cir. 1996). It constitutes an affirmative defense that may be raised when there is substantial similarity between two works and evidence of copying. See Castle Rock Entm't, Inc. v. Carol Pub'g Group, Inc., 150 F.3d 132 (2d Cir. 1998) (quoting 3 Nimmer on Copyright 13.05[A]). Under the federal copyright statute, fair use covers purposes such as "criticism,

comment, news reporting, teaching..., scholarship or research." See Bridgeport Music, Inc. v. UMG, Inc.; 17 U.S.C. 107. In determining applicability of the doctrine of fair use, courts consider these statutory factors:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

The Supreme Court has held that these statutory factors must be considered "in light of the purposes of copyright." Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 (1994). For instance the first factor – the "purpose and character of use" – takes into account whether the work is transformative, that is, whether it would further the purpose of copyright to advance scientific and artistic endeavor. See id. at 579.

The respondents' derivative work "Heroes" presented no "transformativeness" that made the derivative work transcend or place in a new light the underlying work of the petitioners on which "Heroes" is based.

Similarly, the second factor addresses whether the work at issue is within the "core" of copyright protection or more marginal, with "creative expression

for public dissemination" being within the "core of the copyright's protective purpose." Id. at 586.

The third factor calls for both a quantitative inquiry into how much original material was used and a qualitative one, regarding the material's importance in the original work. See id. at 586-87.

Applying the statutory factors from 17 U.S.C. 107, we conclude that the result reached by a jury would not be unreasonable. Although one of them perhaps weighs in favor of defendant, in balance it is clear that the greater weight favors plaintiff is certainly transformative (first factor), having a different theme, mood and tone from the original work. However, as an original work is clearly within the core of copyright protection (second factor). Moreover, although the scope of use by defendants consisted of relatively small elements of the original work, a jury may indicate that they were distinctive and recognizable elements (third factor). Finally, although defendants may argue that the market for "Heroes" was not the same as for the plaintiffs' work, the effect on the market of the copyrighted work also includes the market for derivative works.

The respondents' attorney Marcia Paul stated in court that the petitioners' character's unique storyline, of the artist who can paint the future and the other supporting character storylines and 23 additional fragmented similarities or paraphrases that respondent Tim Kring admitted to "borrowing" to build "Heroes," to "tampering with the parameter of intellectual property to create content for NBC" were just "mere ideas" and "scenes a faire" free for the taking.

This conflicts with the Sixth Circuit Court decision in the case of Bridgeport Music Inc. v. UMG Inc. A jury found UMG Recordings, Inc. and Universal Music Group, Inc. to have willfully infringed Bridgeport's rights in "Atomic Dog" and awarded statutory damages of $88,980. UMG appealed the verdict, claiming that the jury was improperly instructed and that UMG was entitled to judgment in its favor as a matter of law on the question of "substantial similarity." They found no reversible error and affirmed.

George Clinton created "Atomic Dog" in a recording studio in January 1982, working without a written score. Testimony at trial indicated that the song was composed spontaneously.

In 1998, Bridgeport became aware of "D.O.G. in Me" and contacted UMG's predecessors in interest, and later UMG itself, notifying them that elements of "Atomic Dog" were used in the recording without permission and requesting that the record label enter into a licensing agreement or cease distribution of the album and song. When no response was received this lawsuit followed.

As copyright owner, Bridgeport brought the action for copyright infringement against UMG. In turn, UMG filed a motion for summary judgment claiming that the allegedly infringing elements in "D.O.G. in Me," the use of the word "dog" in a low voice as "musical punctuation," the rhythmic panting, and the Bow Wow refrain "were not copyrightable as a matter of law." The district court denied UMG's motion, and the matter proceeded to trial. The jury rendered a verdict in Bridgeport's favor, finding UMG liable for

actual damages and statutory damages. The district court denied UMG's subsequent motion for a new trial and motion for judgment as a matter of law, and UMG appealed. Reduced to its essentials, the appeal challenges the propriety of the jury instructions in three respects; substantial similarity, fair use, and willfulness.

In this case (Mallery v. NBC), the respondent argued that the elements infringed were "mere ideas," "scenes a faire," "unprotected elements," not copyrightable as a matter of law, that are free for the taking. Those infringed elements were main storylines and at the core of the respondents' work. Those same elements were used to pitch and sale the pilot to the NBC network, resulting in "Heroes" being a number one hit TV Series. When those elements were removed from the respondents' work, the TV series fell off the ratings.

In Bridgeport Music Inc. v. UMG, Inc., the indispensable or standard aspects of a work, or those that follow directly from unprotectable ideas, should be filtered out as well. Once the unprotectable elements have been filtered out the two works can be compared to determine whether they are substantially similar, a question of fact. The question for the jury in substantial similarity cases is whether a lay observer would consider the works as whole substantially similar to one another. Murray Hill v. Twentieth Century Fox, 361 F.3d 312, 320 (2004); Williams v. Crichton, 84 F.3d 581, 590 (2d Cir. 1996).

However, as have several of our sister circuits, we have also noted that it is appropriate to modify this inquiry for situations in which a smaller fragment of

a work has been copied literally, but not the overall theme or concept, an approach referred to in the literature as "fragmented literal similarity." See 4 Melville B. Nimmer & David Nimmer, Nimmer on Copyright 13.03[A][2] (rev. ed. 2009); see also Bridgeport, Inc. v. Dimension Films, 410 F.3d 792, 797-98 (6th Cir. 2005); Positive Black Talk, Inc. v. Cash Money Records, Inc., 394 F.3d 357, 373 n.12 (5th Cir. 2004) (noting support for this approach in other circuits). In such situations, even a small degree of copying may support a finding of substantial similarity, depending on the context. See Murray Hill Publ'ns, Inc. v. ABC Commc'ns, Inc., 264 F.3d 622, 633 (6th Cir. 2001) (to constitute infringement a single line No. 7-5596 Bridgeport Music, Inc. v. UMG Inc., page 7 taken from a protected work would have to be "an integral part" of that work rather than "merely an incidental part of the background" and, by analogy as "readily recognizable" in terms of its relationship .... as "E.T. phone home" is to its movie source"). Thus, the copying of a relatively small but qualitatively important or crucial element can be an appropriate basis upon which to find substantial similarity. See Baxter v. MCA, Inc., 812 F.2d 421, 425 (9th Cir. 1987) (citing Hein v. Universal Pictures Co., 154 F.2d 480, 488 (2d Cir. 1946) for the proposition that a single brief phrase so idiosyncratic as to preclude coincidence might suffice to show copying.

Given that the two songs differed in theme, tempo, and style, UMG argued, no reasonable jury could have found substantial similarity. But, instead of instructing the jury to consider the works as a whole, the district court utilized the "fragmented literal similarity" standard. We conclude that in the circumstances of this case, there was no error.

The respondents in Mallery v. NBC admitted to using the artist that can paint the future and artwork in the pilot script as a sale device to pitch "Heroes" to NBC network. The petitioners' storyline of an artist who can paint the future on canvas before it happens, validate the predicted event with newspaper clippings, that lives in New York City and painted a catastrophe of two NYC landmark buildings before it happened and attempts to stop that event with the help of other supporting character storylines is unique and exclusive to its originator. There is no mere incident that the same main and important character storyline of the petitioners' work with 23 other fragmented similarities and paraphrases appear in the respondents' work "Heroes." The District Court and U.S. Court of Appeal erred to affirm the respondents' argument that these expressions were random, few and isolated unprotectable scene a faire.

Before the petitioners filed a lawsuit against the respondents for copyright infringement, a third party market affiliate in contract with NBC through Link Share created a website at http://www.therealheroes.blogspot.com/2006/10/mission-5- <http://www.therealheroes.blogspot.com/2006/10/mission-5-> see–.connections.html to generate sales and viewership for "Heroes," "Heroes products and shop NBC" by using petitioners likeness from a New York Daily newspaper article written by writer LLoyd Grove without the petitioners, the NY Daily News's or LLoyd Grove's permission. New York Times Co. v. Tasini, 533 U.S. 483, 505 (2001). After being notified NBC and the respondents issued "no DMCA take down notices" to remove petitioners likeness from this website as NBC did with youtube.com <http://youtube.com/>. The website mission is to find people like the characters on

the respondents' TV show "Heroes" and to promote and sell "Heroes," Heroes Products, I-Tunes and shop NBC" to Heroes fans and NBC customers.

The petitioners state that Miriam-Webster Dictionary states that "an idea arises in a reflex, spontaneous manner, even without thinking or serious reflection."

The petitioner Clifton Mallery a/k/a Enjai Omaa Eele is a real living artist that can paint the future. His ancestors' tribe, The Luba, and his art work based on this rare and unique ability is part of the permanent collection of the MET Museum NYC and the New York Historical Society's Archives, the petitioners and their tribe The Luba have been studied and exhibited by UCLA professors and others for over 30 years. The only "mere idea" in this case is that the respondent Tim Kring got "the idea" to change the petitioners' copyrighted character Idai Markus into Issac Mendez, the respondent Tim Kring placed the character Issac Mendez in his script as a sales device and sold Issac Mendez to the respondent NBC as his own (Tim Kring's) original intellectual property, which it is not.

The respondent Tim Kring's actions were "Not a good idea" and it would be an "even worse idea" for the Supreme Court to allow such a devastating unlawful precedent to be set with a lawsuit that includes a respondent Tim Kring that admitted to not only "accessing and copying" another artist's (the petitioner – Clifton Mallery a/k/a Enjai Omaa Eele) intellectual property but respondent Tim Kring admitted in the media to lying, cheating, and "scheming" to get the stolen IP "Heroes" on the air.

The law says:

> Whoever, having devised or intending to devise any *scheme* or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing each scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000.00 or imprisoned not more than 30 years, or both.

18 U.S.C. 1343 (emphasis added).

Tim Kring stated:

> I lied and schemed and manipulated all the way through the idiocy that is the notes process when you do this, was able to push the production through relatively unscathed and in the form that it would work in. . . . That's how Heroes got on the air.
>
> It's NOT THE MOST ORIGINAL IDEA in the world, you build and BORROW. Just put these pieces together in the right way, at the right time, and on the right network.

http://blog.the-eg.com/2007/12/04/tim-kring/ (emphasis added).

> We are literally making up the parameters of the intellectual property that will take the networks into the next generation.

http://www.fastcompany.com/magazine/125/rebel-alliance.html (quoting Tim Kring). (See Appendix O, 56a).

CONCLUSION

For all the foregoing reasons, petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

Clifton Mallery a/k/a Enjai Omaa Eele
Amnau Karam Eele
P.O. Box 20474
New York, NY 10011
212-330-7137
eeletwins10102002@yahoo.com

Petitioners pro se

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Nos. 08-0655-cv(L) and 08-2280-cv(CON)

[Filed June 3, 2009]

CLIFTON MALLERY, also known as Enjai Omaa Eele, and AMNAU KARAM EELE,	)
Plaintiffs-Appellants,	)
v.	)
NBC UNIVERSAL, INC., NBC UNIVERSAL TELEVISION STUDIO, TAIL WIND PRODUCTIONS, TIM KRING, DENNIS HAMMER, ALLAN ARKUSH, JEPH LOEB, and BRYAN FULLER,	)
Defendants-Appellees.	)

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE

32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT HTTP://WWW.CA2.USCOURTS.GOV/). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan Courthouse, 500 Pearl Street, in the City of New York, on the 3rd day of June, two thousand nine.

Present:

HON. ROGER J. MINER,
HON. ROBERT A. KATZMANN,
HON. REENA RAGGI,
Circuit Judges.

For Plaintiffs-Appellants:	MICHAEL CONFUSIONE, Hegge & Confusione, LLC, Haddonfield, NJ
For Defendants-Appellees NBC Universal, Inc. and NBC Universal Television Studio:	MARCIA B. PAUL (Lacy H. Koonce, III, *on the brief*), Davis Wright Tremaine LLP, New York, NY Hilary Lane, NBC Universal, Inc., *on the brief*, New York, NY

Appeal from the United States District Court for the Southern District of New York (Cote, *J.*).

ON CONSIDERATION WHEREOF, it is hereby **ORDERED, ADJUDGED**, and **DECREED** that the case is **AFFIRMED**.

Plaintiffs-Appellants appeal from the judgment of the United States District Court for the Southern District of New York (Cote, *J.*) dismissing their complaint and from the judgment granting Defendants-Appellees' application for attorneys' fees. We assume the parties' familiarity with the facts of the case, its procedural history, and the scope of the issues on appeal.

After converting Defendants' motion to dismiss into a motion for summary judgment, the district court granted the motion, finding that the relevant works are not substantially similar as a matter of law. *See Mallery v. NBC Universal, Inc.*, No. 07 Civ. 2250, 2007

WL 4258196, 2007 U.S. Dist. LEXIS 88960 (S.D.N.Y. Dec. 3, 2007).

Although a district court generally should give parties specific notice of its intent to convert a motion to dismiss into a motion for summary judgment, specific notice is not required in all circumstances. *See, e.g., Gurary v. Winehouse*, 190 F.3d 37, 43 (2d Cir. 1999). "The essential inquiry is whether the appellant should reasonably have recognized the possibility that the motion might be converted into one for summary judgment or was taken by surprise and deprived of reasonable opportunity to meet facts outside the pleadings." *Id.* (internal quotation marks omitted). In this case, the district court concluded that the only materials pertinent to the motion for summary judgment were incorporated in the complaint by reference. Because the motion was decided by reviewing only materials contained in the pleadings, Plaintiffs were not deprived of an opportunity to meet facts outside the pleadings.

Summary judgment was appropriate in this case because no reasonable jury could find that there was substantial similarity between Defendants' television series, *Heroes*, and the original, protectible elements of Plaintiffs' works. *See Kregos v. Associated Press*, 3 F.3d 656 (2d Cir. 1993).

As the district court aptly described:

> *Heroes* is a hour-long suspense/drama that mixes moments of action, humor, and mystery as it follows an eclectic, international group of genetically enhanced heroes and their quest to prevent a catastrophic explosion in New

> York--an explosion that may be caused, it turns out, by one of their own number. *The Letter*, by contrast, is a fifteen-minute, documentary-style film with a jaunty soundtrack that presents an account of [the main characters'] attempt to warn Robert De Niro and Tribeca Films about September 11. . . . [T]he two stories are not similar in mood, details or characterization, and, indeed, differ in nearly every relevant way. *The Twins* also presents a stark contrast to *Heroes*; it is a sprawling, fantastical story about, among many other things, two spiritual "twins" who are married to one another and are members of a mysterious "Divination Clan." . . . [T]he context, presentation, plot lines, narrative structure, and style of the two works are substantially different . . . .

Mallery, 2007 WL 4258196, at *8, 2007 U.S. Dist. LEXIS 88960, at *23-24 (citation and internal quotation marks omitted). The few and isolated similarities that Plaintiffs have identified are unprotected ideas or scènes à faire. *See generally MyWebGrocer, LLC v. Hometown Info, Inc.*, 375 F.3d 190, 194 (2d Cir. 2004) ("Scenes a faire are unprotectible elements that follow naturally from a work's theme rather than from an author's creativity."); *Williams v. Crichton*, 84 F.3d 581, 588 (2d Cir. 1996).

Having dismissed Plaintiffs' complaint, the district court acted within its discretion in granting Defendants' application for attorneys' fees. The district court properly concluded that Plaintiffs' claims were objectively unreasonable, "as the profound dissimilarity between their works and *Heroes* was

indeed 'obvious.'" Given this conclusion, the district court did not abuse its discretion granting Defendants' application for attorneys' fees. *See Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 n.19 (1994) (approving of the district court's consideration of a party's "objective unreasonableness" when exercising discretion in awarding attorneys' fees under the Copyright Act); *see also Matthew Bender & Co. v. West Publ'g Co.*, 240 F.3d 116, 121 (2d Cir. 2001) ("Subsequent to *Fogerty*, several other circuits have accorded the objective reasonableness factor substantial weight in determinations whether to award attorneys' fees).

We have considered Plaintiffs' remaining arguments and find them to be without merit. Accordingly, for the foregoing reasons, the judgment of the district court is hereby **AFFIRMED**.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK

By:_____

APPENDIX B

UNITED STATES DISTRICT
SOUTHERN DISTRICT OF NEW YORK

No. 07 Civ. 2250 (DLC)

[Filed April 11, 2008]

CLIFTON MALLERY a/k/a ENJAI OMAA EELE and AMNAU KARAM EELE,	)
Plaintiffs,	)
- against -	)
NBC UNIVERSAL, INC., NBC UNIVERSAL TELEVISION STUDIO, TAIL WIND PRODUCTIONS, TIM KRING, DENNIS HAMMER, ALLAN ARKUSH, JEPH LOEB and BRYAN FULLER,	)
Defendants.	)

JUDGMENT ON ATTORNEYS FEES

Defendants having moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6), and the matter having come before the Honorable Denise Cote, United States District Judge, and the Court, on December 3, 2007 and February 21, 2008, having rendered its Opinion and Order and Memorandum Opinion and

Order granting defendants' motion to dismiss which was converted to a motion for summary judgment, and the Court having entered Judgment in favor of defendants on February 22, 2008; and

Defendants having filed an application for attorneys fees pursuant to 17 U.S.C. § 505 and Federal Rule or Civil Procedure 54(d), and the matter having come before the Honorable Denise Cote, United States District Judge, and the Court, on March 18, 2008, having rendered its Memorandum Opion and Order granting defendants' application, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Memorandum Opinion and Order dated March 18, 2008, judgment is entered in the amount of $99,106.45 in attorneys fees under 17 U.S.C. § 505, and post-judgment interest under 28 U.S.C. § 1961 shall accrue on the total Judgment amount from the date of entry of the Judgment until the Judgment is satisfied.

The Clerk of the Court is directed to enter this Judgment in accordance with the aforesaid.

Dated: New York, New York
April 11, 2008

/s/
Honorable Denise Cote
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 07 Civ. 2250 (DLC)

[Filed March 18, 2008]

CLIFTON MALLERY a/k/a ENJAI OMAA EELE and AMNAU KARAM EELE,
Plaintiffs,

-v-

NBC UNIVERSAL, INC., NBC UNIVERSAL TELEVISION STUDIO, TAILWIND PRODUCTIONS, TIM KRING, DENNIS HAMMER, ALLAN ARKUSH, JEPH LOEB and BRYAN FULLER,
Defendants.

MEMORANDUM OPINION AND ORDER

Appearances:

For Plaintiffs:
John A. Coleman, Jr.
Freidberg Cohen Coleman & Pinkas, LLP
444 Madison Avenue, Suite 805
New York, NY 10022

For Defendants:
Marcia Beth Paul
Lacy H. Koonce
Davis Wright Tremaine LLP
1633 Broadway
New York, NY 10019

Hilary Lane
NBC Universal, Inc.
Legal Department
30 Rockefeller Plaza
New York, NY 10122

DENISE COTE, District Judge:

Plaintiffs Clifton Mallery a/k/a Enjai Omaa Eele and Amnau Karam Eele ("plaintiffs") brought this action against the defendants NBC Universal, Inc., NBC Universal Television Studio, Tailwind Productions, Tim Kring, Dennis Hammer, Allan Arkush, Jeph Loeb, and Bryan Fuller ("defendants") alleging that the television series Heroes, which is (collectively) written, produced, and broadcast by the defendants, infringed the copyrights held by the plaintiffs in their 777-page handwritten novel The Twins: Journey of the Soul ("The Twins"), their short film based on The Twins entitled The Letter, and their painting series Envious of America. Defendants moved to dismiss, and the motion was converted to a motion for summary judgment and granted in an Opinion dated December 3, 2007. Mallery v. NBC Universal, Inc., No. 07 Civ. 2250 (DLC), 2007 WL 4258196 (S.D.N.Y. Dec. 3, 2007) (the "December 2007 Opinion"). As the prevailing party in this copyright action, defendants have now filed an application for attorney's fees pursuant to 17 U.S.C. § 505 in the amount of

$99,106.45. For the reasons stated below, that application is granted.

DISCUSSION

The Copyright Act permits a court "in its discretion" to award costs, including a "reasonable attorney's fee," to the prevailing party in a copyright infringement action. 17 U.S.C. § 505. In deciding whether to award such costs and fees, courts may consider, among other factors, "frivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence." Fogerty v. Fantasy, Inc., 510 U.S. 517, 534 n.19 (1994) (citation omitted). The Court of Appeals has held that the factor of "objective unreasonableness" should be given "substantial weight" in conducting the analysis called for in Fogerty, Matthew Bender & Co., Inc. v. West Publ'g Co., 240 F.3d 116, 122 (2d Cir. 2001), and courts of this Circuit have awarded fees under § 505 based on a finding of objective unreasonableness alone. See, e.g., Adsani v. Miller, No. 94 Civ. 9131 (DLC), 1996 WL 531858, *13 (S.D.N.Y. Sept. 19, 1996) (citing cases); see also Baker v. Urban Outfitters, Inc., 431 F. Supp. 2d 351, 357 (S.D.N.Y. 2006). In any event, these factors must be applied in a manner that is "faithful to the purposes of the Copyright Act," Fogerty, 510 U.S. at 534 n.19, which is "'[t]o promote the Progress of Science and useful Arts.'" Id. at 527 (quoting U.S. Const. art. I, § 8, cl. 8)). As both the prevention of infringement and the successful defense of unmeritorious copyright claims can further this goal, the Supreme Court has held that awards under § 505

are equally available to prevailing defendants and prevailing plaintiffs. Id. at 526-27, 533.

Although a finding that a defendant is entitled to summary judgment does not automatically entitle that defendant to attorney's fees pursuant to § 505, see Adsani, 1996 WL 531858, at *16 (citing CK Co. v. Burger King Corp., No. 92 Civ 1488 (CSH), 1995 WL 29488, *1 (S.D.N.Y. Jan. 26, 1995)), the December 2007 Opinion demonstrates that the plaintiffs' copyright infringement claims were objectively unreasonable. As described in that Opinion, a careful review of the plaintiffs' works and Heroes television program reveals that the plaintiffs' "claims are wholly without merit, as nearly every instance of alleged similarity between Heroes and the plaintiffs' work relates to unprotectable ideas rather than protectable expression and, viewed more broadly, the 'total concept and feel' of these works are profoundly different." December 2007 Opinion, at *6 (quoting Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc., 150 F.3d 132, 140 (2d Cir. 1998)). In particular, the plaintiffs' argument that the use of a "stopping the catastrophe" story arc, symbols, close-up images of eyes, "twin" characters (i.e., characters that often appear together on screen), and block lettering in title sequences made Heroes and the plaintiffs' works substantially similar bordered on the frivolous, both legally and factually. Id. at *7. The comparison plaintiffs attempted to draw between Isaac Mendez of Heroes and the characters depicted in the plaintiffs' work was likewise objectively unreasonable as a matter of law, id. at *6, and fact. Id. at *7.

Plaintiffs argue in opposition to the fee application that "determinations about substantial similarity are

rarely obvious," citing Pasillas v. McDonald's Corp., 927 F.2d 440, 444 (9th Cir. 1991), and that the plaintiffs "truly believe" that, in light of alleged similarities, defendants did copy their work. Even assuming the truth of both of these statements, however, plaintiffs' claims remain objectively unreasonable, as the profound dissimilarity between their works and Heroes was indeed "obvious" in this case, and plaintiffs' professed subjective belief to the contrary is thus itself unreasonable and entitled to no weight here. In addition, an award under § 505 in this case would "advance considerations of compensation and deterrence," Fogerty, 510 U.S. at 534 n.19 (citation omitted), as "failing to award attorney's fees to defendants . . . would invite others to bring similarly unreasonable actions without fear of any consequences." Earth Flag Ltd. v. Alamo Flag Co., 154 F. Supp. 2d 663, 668 (S.D.N.Y. 2001). It is therefore appropriate to award attorney's fees to the defendants under § 505.

Thus, it is now necessary to consider whether the $99,106.45 requested by the defendants represents a "reasonable attorney's fee." 17 U.S.C. § 505. In making this determination, courts should apply "the lodestar method," which "emphasiz[es] a comparison to rates of lawyers of similar skill and experience in the community," Crescent Publishing Group, Inc. v. Playboy Enters., Inc., 246 F.3d 142, 150 (2d Cir. 2001) (citing Hensley v. Eckerhart, 461 U.S. 424, 433-34 (1983) (42 U.S.C. § 1988)), while keeping in mind that, "for prevailing parties with private counsel, the actual billing arrangement" should be considered "a significant, though not necessarily controlling, factor in determining what fee is 'reasonable.'" Id. at 151.

Defendants have submitted in support of their application detailed billing reports stating the rates charged by defense counsel and the hours spent on each litigation task. Plaintiffs do not argue that defense counsel's rates are unreasonable, but rather that the time spent drafting the defendants' motion papers -- 145.5 hours, by plaintiffs' count -- "seems excessive." Having reviewed the billing records, as well as defendants' submissions in connection with the motion to dismiss, plaintiffs' argument on this point is rejected. The plaintiffs' claims stemmed from a sprawling tale in a lengthy hand-written novel, a film, and a series of paintings, and a host of alleged similarities with a successful television series. To address the entirety of the plaintiffs' claims, it was entirely reasonable for the defendants to expend this effort on their motion practice.

Finally, both of the plaintiffs have submitted identical, three-sentence affidavits reporting, in substance, that they "have no home, no job, no regular income, no money and no financial assets," and requesting that the Court take these facts into account in addressing defendants' application. While it is not contested that the relative financial status of the parties may be an appropriate consideration in determining whether an award under § 505 is reasonable, see Adsani, 1996 WL 531858, at *16, plaintiffs' brief, unsupported affidavits are insufficient to alter the analysis in this case. The otherwise reasonable award sought by the defendants will therefore not be reduced on the basis of claimed financial hardship.

CONCLUSION

The defendants' application for $99,106.45 in attorney's fees under 17 U.S.C. § 505 is granted. The Clerk of Court shall close the case.

SO ORDERED:

Dated: New York, New York
March 18, 2008

/s/
DENISE COTE
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 07 CIVIL 2250 (DLC)

[Filed February 22, 2008]

CLIFTON MALLERY a/k/a ENJAI OMAA EELE and AMNAU KARAM EELE,	)
Plaintiffs,	)
- against -	)
NBC UNIVERSAL, INC., NBC UNIVERSAL TELEVISION STUDIO, TAIL WIND PRODUCTIONS, TIM KRING, DENNIS HAMMER, ALLAN ARKUSH, JEPH LOEB and BRYAN FULLER,	)
Defendants.	)

JUDGMENT

Defendants having moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6), and the matter having come before the Honorable Denise Cote, United States District Judge, and the Court, on December 3, 2007 and February 21, 2008, having rendered its Opinion and Order and Memorandum Opinion and

Order granting defendants' motion to dismiss which is converted to a motion for summary judgment, it is

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Opinion and Order and Memorandum Opinion and Order dated December 3, 2007 and February 21, 2008, defendants' motion to dismiss is converted to a motion for summary judgment and is granted; judgment is entered in favor of defendants.

Dated: New York, New York
February 22, 2008

J. MICHAEL McMAHON
Clerk of Court

BY:

/s/
Deputy Clerk

THIS DOCUMENT WAS ENTERED ON THE DOCKET ON _____

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 07 Civ. 2250 (DLC)

[Filed February 21, 2008]

CLIFTON MALLERY a/k/a ENJAI OMAA EELE and AMNAU KARAM EELE,
Plaintiffs,

-v-

NBC UNIVERSAL, INC., NBC UNIVERSAL TELEVISION STUDIO, TAILWIND PRODUCTIONS, TIM KRING, DENNIS HAMMER, ALLAN ARKUSH, JEPH LOEB and BRYAN FULLER,
Defendants.

MEMORANDUM OPINION AND ORDER

Appearances:

For Plaintiffs:
John A. Coleman, Jr.
Freidberg Cohen Coleman & Pinkas, LLP
444 Madison Avenue, Suite 805
New York, NY 10022

For Defendants:
Marcia Beth Paul
Davis Wright Tremaine LLP
1633 Broadway
New York, NY 10019

DENISE COTE, District Judge:

On December 4, 2007, an Opinion and Order was entered on the docket in this action granting summary judgment for the defendants in this copyright action. Following several failed attempts to electronically file a notice of appeal from this Opinion and Order, plaintiffs moved on February 5, 2008, pursuant to Rule 4(a)(5), Fed. R. App. P., for an extension of time to file their notice of appeal. Defendants have filed opposition. For the reasons stated below, plaintiffs' motion is denied as moot, as the notice of appeal filed by plaintiffs on February 5, 2008, in connection with their motion is timely and no extension of time under Rule 4(a)(5) is required.

Following the entry of the December 4, 2007, Opinion and Order on the docket, judgment was not set forth on a separate document as required by Rule 58, Fed. R. Civ. P. Thus, pursuant to Rule 4(a)(7)(A)(ii), Fed. R. App. P., judgment has not yet been "entered" within the meaning of Rule 4(a)(1)(A). As a result, the 30-day time limitation provided by Rule 4(a)(1)(A) has not yet begun to run, and will not begin to run until the earlier of (1) the setting forth of the judgment on a separate document as required by Rule 58, Fed. R. Civ. P., or (2) 150 days from the entry of the December 4, 2007, Opinion and Order. The

plaintiffs' notice of appeal filed on February 4, 2008, is therefore timely as filed under Rule 4, Fed. R. App. P.[1]

CONCLUSION

Plaintiffs' February 5, 2008, motion for an extension of time to file a notice of appeal is denied as moot, and the notice of appeal filed on February 5, 2008, is deemed timely. The Clerk of Court is directed to enter judgment in favor of the defendants pursuant to this Court's Opinion and Order of December 4, 2007.

SO ORDERED:

Dated: New York, New York
February 21, 2008

/s/
DENISE COTE
United States District Judge

[1] Plaintiffs may also take note that, under Rule 4(a)(7)(B), the "failure to set forth a judgment or order on a separate document . . . does not affect the validity of an appeal from that judgment or order."

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

07 Civ. 2250 (DLC)

[Filed December 3, 2007]

CLIFTON MALLERY a/k/a ENJAI OMAA EELE and AMNAU KARAM EELE,
Plaintiffs,

-v-

NBC UNIVERSAL, INC., NBC UNIVERSAL TELEVISION STUDIO, TAILWIND PRODUCTIONS, TIM KRING, DENNIS HAMMER, ALLAN ARKUSH, JEPH LOEB and BRYAN FULLER,
Defendants.

OPINION AND ORDER

Appearances:

For Plaintiffs:
John A. Coleman, Jr.
Freidberg Cohen Coleman & Pinkas, LLP
444 Madison Avenue, Suite 805
New York, NY 10022

For Defendants:
Marcia Beth Paul
Davis Wright Tremaine LLP
1633 Broadway
New York, NY 10019

DENISE COTE, District Judge:

Plaintiffs Clifton Mallery a/k/a Enjai Omaa Eele and Amnau Karam Eele ("plaintiffs") bring this action against the defendants NBC Universal, Inc., NBC Universal Television Studio, Tailwind Productions, Tim Kring, Dennis Hammer, Allan Arkush, Jeph Loeb, and Bryan Fuller ("defendants") alleging that the television series Heroes, which is (collectively) written, produced, and broadcast by the defendants, infringes the copyrights held by the plaintiffs in their 777-page handwritten novel The Twins: Journey of the Soul ("The Twins"), their short film based on Twins entitled The Letter, and their painting series Envious of America. On June 15, 2007, defendants moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6). For the reasons stated below, the motion to dismiss is converted to a motion for summary judgment and is granted.

BACKGROUND

The following facts are taken from the complaint. Plaintiffs are "divination artists" known professionally as "The Twins." On April 22, 2005, plaintiffs screened their short film The Letter at Hunter College in New York City, exhibited paintings from their series Envious of America, and presented a lecture on their art. At this event, they also made available excerpts from their novel The Twins. Persons identifying

themselves as writers from defendant Tim Kring's ("Kring") television show Crossing Jordan attended the event and "are believed to have taken copies" of those materials. Plaintiffs also screened The Letter at several other venues, and sent excerpts of The Twins along with a copy of The Letter to several entertainment executives, including to a corporate affiliate of defendants NBC Universal and NBC Universal Television Studio.

Defendant Kring conceived the idea for the television series Heroes around October or November of 2005. Heroes debuted on NBC in September 2006, and twenty-three episodes of the series had aired at the time the motion to dismiss was filed, constituting the first season of the series. Plaintiffs allege that Heroes is "so strikingly similar" to their works The Twins, The Letter, and Envious of America that Kring and the other defendants "must have had access to and copied" their work.

DISCUSSION

I. Governing Copyright Standards

"Copyright infringement is established when the owner of a valid copyright demonstrates unauthorized copying." Tufenkian Import/Export Ventures, Inc v. Einstein Moomjy, Inc., 338 F.3d 127, 131 (2d Cir. 2003) (quoting Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc., 150 F.3d 132, 137 (2d Cir. 1998)). In order to prevail on a claim for infringement, a copyright holder must show (1) "that his work was actually copied," and (2) "that the copying amounts to an improper or unlawful appropriation." Castle Rock Entm't, 150 F.3d at 137 (citation omitted).

Under the first prong, "[b]ecause direct evidence of [actual] copying is seldom available, a plaintiff may establish copying circumstantially by demonstrating that the person who composed the defendant's work had access to the copyrighted material, and that there are similarities between the two works that are probative of copying." Jorgensen v. Epic/Sony Records, 351 F.3d 46, 51 (2d Cir. 2003) (citation omitted). Similarities between the works are "probative" if, "under all the circumstances, [they] make independent creation unlikely." Laureyssens v. Idea Group, Inc., 964 F.2d 131, 140 (2d Cir. 1992) (citation omitted).

The second prong requires a plaintiff to demonstrate "unlawful appropriation." This reflects a recognition that even where "actual copying" may have occurred, not all such copying is actionable under the copyright laws. To establish "unlawful appropriation," a plaintiff must demonstrate "substantial similarity" between the original and allegedly infringing works. Tufenkian Import/Export Ventures, 338 F.3d at 131 (citation omitted). The works are "substantially similar" if the similarities are "more than de minimis," and if "it was protected expression in the earlier work that was copied." Id. (citation omitted). Where the copying is not literal or does not plagiarize the protected work, infringement may nonetheless occur. Id. at 132-33. To determine whether a defendant has infringed a plaintiff's copyright in these circumstances, a court must "analyze the . . . works closely to figure out in what respects, if any, they are similar, and then determine whether these similarities are due to protected aesthetic expressions original to the allegedly infringed work, or whether the similarity is to something in the original that is free for the taking." Id. at 134-35.

For the purposes of this motion, defendants do not contest that the plaintiffs hold registered copyrights in The Twins, The Letter, or Envious of America,[1] or deny that they had access to these works. Rather, defendants argue that there is simply no "substantial similarity" between these works and the television show Heroes, and that plaintiffs' copyright infringement claim therefore fails as a matter of law. Plaintiffs counter by pointing out both general and specific similarities between the works in question.

In light of the arguments presented, this motion is properly treated as a motion for summary judgment. Whether certain works are substantially similar to one another is a question of fact to be resolved by a jury. Cf. Yurman Design, Inc. v. PAJ, Inc., 262 F.3d 101, 111 (2d Cir. 2001) (citing Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 355 (1998)). "However, a district court may determine noninfringement as a matter of law on a motion for summary judgment either when the similarity concerns only noncopyrightable elements of plaintiff work, or when no reasonable trier of fact could find the works substantially similar." Walker v. Time Life Films, Inc., 784 F.2d 44, 48 (2d Cir. 1986); see also Williams v. Crichton, 84 F.3d 581, 587 (2d Cir. 1996). Although the defendants filed their motion pursuant to Fed. R. Civ. P. 12(b)(6), the arguments raised in the defendants' motion papers and in the plaintiffs' opposition have focused almost exclusively on these questions -- i.e.,

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[1] Although the defendants' do not press this argument, it may be noted that the complaint itself and the record to date do not reflect that Envious of America, or any of the paintings that make up that series, have been registered with the copyright office.

whether the alleged similarities relate to noncopyrightable elements and whether any reasonable observer could consider the works substantially similar -- and thus it is appropriate to convert this motion to one for summary judgment in order to address the merits of the arguments raised by the parties.[2] Before a discussion of the merits can proceed, however, it is first necessary briefly to review the works in question.

II. Summary of Works at Issue

A. The Twins

The Twins is a 777-page, handwritten novel co-authored by the plaintiffs. It chronicles the lives of Idai and Hadah, "twins" who are separated before birth into two different wombs by their grandmother, a mystic named Madame Naomi Dachette. "The Twins,"

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[2] A district court must ordinarily give notice to the parties before converting a motion to dismiss to a motion for summary judgment. See, e.g., Kopec v. Coughlin, 922 F.2d 152, 154-55 (2d Cir. 1991). "A party is deemed to have notice that a motion may be converted," however, "if that party should reasonably have recognized the possibility that such a conversion would occur." Sira v. Morton, 380 F.3d 57, 68 (2d Cir. 2004) (citation omitted). Given the arguments raised by the parties (as well as the cases cited, which almost exclusively resolve such arguments on motions for summary judgment), the parties should have reasonably recognized that the instant motion could be converted to one for summary judgment. In any event, the parties have suffered no prejudice as a result of the conversion, as the works in question are the only documents it is necessary to review in order to resolve the questions presented by the motion; thus, "all material made pertinent to [a motion for summary judgment] by Rule 56" is already before the Court. Fed. R. Civ. P. 12(b).

as they are referred to, are born in the same small town in Louisiana, and are aware from a young age that they possess certain special abilities, which are partly genetic and partly spiritual in origin. Early in the novel, for example, Idai predicts the crash of a plane carrying Dylan Renway, an inhabitant of the town. This prediction is embodied in a "sketch" made by Idai. Idai attempts to warn Dylan's mother about the crash, but she ignores Idai's warning, and Idai later sees in the newspaper that his prediction came true. Later in the novel, Idai will also make predictive sketches relating to, among other things, the Columbine shootings and George W. Bush's election in Florida.

The female twin, Hadah, also has the ability to see the future, which she depicts in artwork affixed to the backs of doors. Hadah also has several other powers, including the ability to make her enemies bleed using only her mind, and to transcend space and time. (Idai also appears to share these powers.) In addition, Idai and Hadah are both skilled martial artists.

The Twins are initiated into the Li-Maa Divination Clan by their grandmother, a "Diviner" who is the head of the Clan, as well as Servitor Ti-Qui Saru, a Diviner and "Nem-Fa" who can, among other things, walk through walls. The initiation rituals are elaborate and mystical. For example, the "opening the ground" ritual involves, inter alia, a sheet of fire in which "500,000 faces" appear and enter Hadah's body, and a stone that rises out of the ground and pulls Hadah down into the earth.

Idai and Hadah's families attempt, for a time, to hide The Twins' special abilities, and during this time

Idai works as an engineer for oil companies in Texas, Kuwait, and Mexico, and Hadah works as a salesperson at a jewelry store and fashion model. Idai and Hadah eventually marry, and live in Los Angeles, Miami, and Manhattan.

In addition to tracing the origins and experiences of Idai and Hadah, The Twins follows numerous additional storylines and characters. For example, the novel tells the story of Olagaia Atune, who is born into poverty in Cuba, becomes an art dealer in America, discovers his own special powers -- such as the ability to erase people's memories -- and searches for The Twins and two sacred twin statues. A character by the name of Professor Heinman also searches for The Twins, along with other people with "special abilities." Maitre Jess, a Hatian voodoo priestess, is a rival of Madame Dachette's with whom The Twins do battle. Maitre Jess's story is, in turn, intertwined with the story of several families from Cuba, including the Atune, Ferrer, Vega, and Illadro families, some of whom become involved with Maitre Jess, The Twins, the Santeria religion, and drug and organ trafficking.

The bulk of the novel concerns the intersecting story lines of the characters listed above (along with many others) and the physical and spiritual conflict between The Twins and Maitre Jess. In the last twenty-five pages, Idai makes another sketch prophesying the future, this time predicting that two planes will destroy the Twin Towers on September 11.[3]

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[3] The copyright page of the novel states that it was written in June of 2001. Presumably, plaintiffs proffer the novel itself as proof of their own powers.

The Twins are initially hesitant to share this new "divination" with anyone, recalling that their predictions -- such as their prediction of the Columbine shootings -- are often ignored. The Twins overcome this initial reluctance and travel to the Port Authority to tell someone about their divination, and there they learn that Larry Silverstein is about to buy the doomed buildings. The Twins meet with several people who work for Silverstein in an attempt to warn him about the impending attack. They agree to pass on The Twins' warning to Silverstein, but apparently to no avail, as the novel ends with The Twins watching the first plane hit the Twin Towers.

The tone and pacing of The Twins is sprawling and mystical. The narrative is an undifferentiated stream of description and dialogue without guiding punctuation, and the novel shifts repeatedly between various settings, including Louisiana, Cuba, Miami, Texas, Africa, Paris, New York, and more ethereal realms.

B. The Letter

The Letter is a short film that plaintiffs assert is based on The Twins. The film deals with The Twins' purported efforts to warn Robert De Niro and his company, Tribeca Films, of the September 11 attacks. The Letter opens with a photograph of outer space, which is then superimposed on two figures (presumably The Twins), who walk down a hallway towards a wall on which there are several hand-drawn images. The most prominent image is a symbol that plaintiffs refer to as a "cosmogram": a circle bisected by two straight lines, dividing it into four equal quadrants, as in a simplified Celtic cross. Background

music begins to play -- a somewhat playful and repetitive tune driven by an acoustic guitar and a single male voice -- and the camera zooms into the center of the circle.

As the music continues to play, the captions state that, "[i]n March 2001 four views to September 11, 2001 were hand delivered by The Twins to Jane Rosenthal at Tribeca Films, owned by Robert De[]Niro." These "four views" are then catalogued. They are entitled: (1) "1st View: SIXTH RACE © 1995." This "view" is an image of the painting "Sixth Race," created by plaintiffs, which depicts several ghostly figures gathered around a central figure who appears to be wearing military medals. A photograph of George Bush and Alan Greenspan standing in a similar posture is then superimposed over this image, which plaintiffs state represents a "validation" of the "prediction" contained in the painting. (2) "2nd View: Compliant © 1999." Various symbols (crosses, letters, "cosmograms," etc.) appear one-by-one on the screen in several dozen rows to the sound of a typewriter. The bottom-right corner of the screen contains a section of a "cosmogram."[4] (3) "3rd View: AMNAU'S DIVINING BOARD © 2000." This "view" depicts a door on which various newspaper articles, photographs, and other assorted materials (e.g., a packet of sugar from the United Nations) are mounted, including one scrap of paper that refers to the World Trade Center. (4) "4th View: The Atta Page © 2001." This portion of the video slowly reveals a hand-drawn sketch that depicts, inter

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[4] Plaintiffs assert that the coded symbols "are used to predict the attacks of September 11," although The Letter itself does not suggest that interpretation.

alia, two planes crashing into the Twin Towers, the name "Atta," and the date and time of the September 11 attacks.

After the "four views" are described, the captions and video explain that these works, which plaintiffs assert predicted the September 11 attacks, were sent to Tribeca films and rejected. A pair of disembodied eyes then appears on the screen; the eyes are slowly revealed to be those of Mohamed Atta. Another video sequence shows photographs of Robert De Niro and Jane Rosenthal delivering food via boat to workers at Ground Zero, and of "The Twins" crying following the September 11 attacks.

C. Envious of America

The complaint states that Envious of America is a "series of oil-on-canvas paintings" painted in 1995 that have been exhibited at several galleries across the country. Plaintiffs assert that "The Sixth Race," which is depicted in The Letter and discussed in The Twins, is a part of that series.

D. Heroes

Heroes is an hour-long, weekly television series about ordinary people who discover that they posses extraordinary powers, and the complications, adventures, and dangers that follow. Key characters include Isaac Mendez, a comic-book artist and drug addict from New York who can "paint the future" when high on heroin; Claire Bennet, a cheerleader from Texas who can heal herself; Mr. Bennet, Claire's adoptive father, who works for an unnamed organization that tracks people with special abilities;

Mr. Bennet's assistant, "The Haitian," who can erase people's memories and block the use of certain heroes' powers; Hiro Nakamura, an office worker from Japan who can bend time and space; Matt Parkman, a policeman who can read minds; Nathan Petrelli, a politician running for Congress, who can fly; Peter Petrelli, Nathan's brother, who can "absorb" the powers of others; Sylar, a serial killer who robs others of their powers; Mohinder Suresh, a professor from India who, following in the footsteps of his slain father, seeks out those with special abilities in order to validate his father's genetic theories; and numerous others. As Mohinder and his father explain, the special powers possessed by these characters are the result of genetic changes caused by the human evolutionary process. During the twenty-three episodes of the first season, Heroes follows each of these characters as they discover their abilities and how they are meant to be used.

In an early episode, Issac paints a picture while high on heroin showing the destruction of New York City by what appears to be an atomic bomb, and Hiro -- during a brief visit to the future -- also sees the same event. Through various plot twists, several of the heroes mentioned above undertake a quest to prevent this attack, during which time the heroes are also being hunted down by Sylar, who seeks to kill them, and sought out by Mohinder, who seeks to study and help them. Toward the end of the first season, Issac is killed by Sylar, but in the final episode the destruction of the city is averted when Peter -- who, it turns out, is the source of the explosion -- is flown by his brother Nathan to a point high above the city, where Peter can explode without harming anyone.

Heroes is suffused with a general air of suspense, due to the gradual revelation of various plot elements, the mysterious nature and origins of the heroes' powers, and the haunting musical soundtrack. The series is also characterized by a visual theme that calls to mind the show's comic-book predecessors in the superhero genre, including captions rendered in a "handwritten" comic-book style.

III. Analysis and Comparison

Plaintiffs allege that Heroes infringes on their copyrights in The Twins, The Letter, and Envious of America. Having reviewed these works in some detail, it is readily apparent that these claims are wholly without merit, as nearly every instance of alleged similarity between Heroes and the plaintiffs' work relates to unprotectable ideas rather than protectable expression and, viewed more broadly, the "total concept and feel" of these works are profoundly different.[5] Castle Rock, 150 F.3d at 140.

Plaintiffs' complaint contains a litany of alleged "substantial similarities" between Heroes and either The Twins, The Letter, or both.[6] Plaintiffs focus

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[5] The parties contest whether plaintiffs' works can be considered in the aggregate for the purposes of evaluating their copyright infringement claim. As the discussion below indicates, resolution of this question is not necessary, as plaintiffs' claim fails regardless of the manner in which their works are considered.

[6] Although the infringement claim also makes reference to Envious of America, the complaint does not assert any similarities between Heroes and that painting series specifically. (Various references are made, however, to the plaintiffs "work" as a whole.)

particularly on the similarities between Idai from The Twins and Isaac Mendez of Heroes, noting that both (1) are "minorities" (Idai is African- American and plaintiffs presume Issac Mendez to be Latino), (2) have the ability to "paint the future"; (3) often paint in oil on large canvasses; (3) create depictions of "two landmark New York City buildings being destroyed" (Idai the Twin Towers, Issac the Empire State and Chrysler Buildings); (4) create paintings of a bus being destroyed in the future, which prediction is then validated in a newspaper article; and (5) attempt to stop the destruction of those buildings.

Plaintiffs' allegations regarding the similarities between Idai and Isaac cannot form the basis for a copyright infringement claim for several reasons. On the most general level, a "minority artist" who has the ability to paint the future is an "idea" that is not protected under the copyright laws. As Judge Hand memorably noted in the landmark case of Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930):

> If Twelfth Night were copyrighted, it is quite possible that a second comer might so closely imitate Sir Toby Belch or Malvolio as to infringe, but it would not be enough that for one of his characters he cast a riotous knight who kept wassail to the discomfort of the household, or a vain and foppish steward who became amorous of his mistress. These would be no more than Shakespeare's "ideas" in the play . . . .

Id. at 121. In addition, (1) painting a future in which tragic and destructive events take place, such as the destruction of landmark buildings in New York City;

(2) having a prediction confirmed by a newspaper report; and (3) making an attempt to prevent a tragic event in light of a prediction of the future, are simply "scenes a faire, [or] sequences of events that necessarily result from the choice of a setting or situation, [which] do not enjoy copyright protection." Williams, 84 F.3d at 587 (citation omitted).

Of course, it must be recognized that "[a] character is an aggregation of the particular talents and traits his creator selected for him. That each one may be an idea does not diminish the expressive aspect of the combination." Warner Bros. v. Am. Broadcasting Cos., 720 F.2d 231, 243 (2d Cir. 1983). That said, "just as similarity cannot be rejected by isolating as an idea each characteristic the characters have in common, it cannot be found when the total perception of all the ideas as expressed in each character is fundamentally different." Id. That is the case here. In sum, Idai is a member of the fictional Li-Maa Divination Clan, as well as an engineer and martial artist, and is one of a set of spiritual twins; Issac is a comic-book artist and drug addict whose ability to paint the future is only unlocked when he is high on heroin. The "total perception" of these characters could hardly be more different, and the plaintiffs' argument that they are "identical but for the change in race" does not withstand scrutiny.

The other alleged instances of similarity between Heroes and the plaintiffs' works similarly fail to contribute to a valid claim of copyright infringement, as they also allege copying of unprotectable ideas such as a "stopping the catastrophe story arc," the depiction of a "cosmogram" (which appears in one scene in Heroes, as well as in The Letter and The Twins), the

use of symbols "to signal a plot event," characters with "extraordinary abilities," and the use of "block capital letters" in title sequences.[7] While the line between mere "ideas" and protected "expression" is famously difficult to fix precisely, see, e.g., Nichols, 45 F.2d at 121, these alleged "similarities" are textbook examples of the former.

The DVD submitted by plaintiffs in their opposition to the instant motion specifically identifies many of the alleged similarities between Heroes and The Letter, and only underscores the plaintiffs' failure to identify any actionable copying. For example, plaintiffs allege that "close up eye images are used" in both works in a way that is "virtually identical." In support of this claim, the DVD shows (1) the moment in The Letter in which Mohamed Atta's eyes are floating alone on the screen, after which his full face is revealed, and (2) a clip from Heroes in which the camera is tightly zoomed in on one character's eyes, then rapidly zooms out. Plaintiffs also argue that there are "twin characters" in both The Letter and Heroes; in support, the DVD shows an image from The Letter of The Twins walking down a hallway, followed by various scenes from Heroes in which there are two characters together on screen. Needless to say, close-ups of eyes and the depiction of two people simultaneously on screen -- or, as plaintiffs put it, the "twinning" of characters -- are not examples of protectable expression under the copyright laws. The absurd results that would follow

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[7] It may also be noted that the letters used in the title sequences of The Letter and Heroes are not typographically similar, and thus plaintiffs' claim seems to be based solely on the use of white "block capital letters" against a largely black background in both works.

from holding otherwise need not be enumerated. In sum, having "analyze[d] the . . . works closely to figure out in what respects, if any, they are similar," it must be concluded that whatever similarities may be said to exist between Heroes and plaintiffs' works are not "due to protected aesthetic expressions original to the allegedly infringed work," but rather related to ideas "in the original that [are] free for the taking." Tufenkian Import/Export Ventures, 338 F.3d at 134-35.

Plaintiffs also argue that the similarities they have identified are evidence of a "total concept and feel" shared by their works and Heroes. See, e.g., Castle Rock, 150 F.3d at 140. It is well established that "substantial similarity" may be found where a later work appropriates the "total concept and feel, theme, characters, plot, sequence, pace, and setting" of an earlier work, even if no single instance of alleged copying is itself actionable. Id.; see also Tufenkian Import/Export Ventures, 338 F.3d at 134. As the summaries above indicate, however, there is simply no "plausible claim that there is a common aesthetic appeal between" Heroes and The Twins, The Letter, or Envious of America. Castle Rock, 150 F.3d at 140. While plaintiffs have pointed out several highly generalized similarities in characterization (e.g., the ability to paint the future or erase people's memories) visual elements (e.g., the use of symbols, block lettering), and plot points (e.g., a threat to Manhattan, a solar eclipse), this "scattershot" listing "fails to address the underlying issue: whether a lay observer would consider the works as a whole substantially similar to one another," even without scrutinizing the plaintiffs' works to isolate their protected elements. Williams, 84 F.3d at 590. Having reviewed the works

in question, no reasonable juror could find that they are substantially similar.

"Once one goes beyond th[e] level of abstraction" on which the plaintiffs' proffered similarities lie, "the similarity [between the works] disappears." Id. at 589. Heroes is a hour-long suspense/drama that mixes moments of action, humor, and mystery as it follows an eclectic, international group of genetically enhanced heroes and their quest to prevent a catastrophic explosion in New York -- an explosion that may be caused, it turns out, by one of their own number. The Letter, by contrast, is a fifteen-minute, documentary-style film with a jaunty soundtrack that presents an account of The Twins' attempt to warn Robert De Niro and Tribeca Films about September 11. While, on the most abstract level, both of these works concern the prevention of a tragic and violent event in New York, the "two stories are not similar in mood, details or characterization," and, indeed, differ in nearly every relevant way. Reyher v. Children's Television Workshop, 533 F.2d 87, 92 (2d Cir. 1976). The Twins also presents a stark contrast to Heroes; it is a sprawling, fantastical story about, among many other things, two spiritual "twins" who are married to one another and are members of a mysterious "Divination Clan." Although the novel shares various superficial similarities with Heroes, as described in the complaint, the context, presentation, plot lines, narrative structure, and style of the two works are substantially different; indeed, the "the ordinary observer, unless he set out to detect" the similarities, "would be disposed to overlook them" -- precisely the opposite of what the copyright law requires to support an infringement claim. Boisson v. Banian, Ltd., 273 F.3d 262, 272 (2d Cir. 2001).

This conclusion is confirmed by a review of the case law, which reveals that creations far more comparable than Heroes and the plaintiffs' works have been found not to be "substantially similar" as a matter of law. See, e.g., Williams, 84 F.3d 581 (comparing children's book about visit to a dinosaur zoo to Jurassic Park); Walker v. Time Life Films, Inc., 784 F.2d 44 (2d Cir. 1986) (book Fort Apache and film "Fort Apache: The Bronx"); Warner Bros., 720 F.2d 231 (works containing the character "Superman" and television show "The Greatest American Hero"); Reyher, 533 F.2d 87 (children's book My Mother Is the Most Beautiful Woman In The World and short illustrated story for children "The Most Beautiful Woman In The World"); Nichols, 45 F.2d 119 ("Abie's Irish Rose" and "The Cohens and the Kellys"). A review of these authorities and a comparison of the works at issue here compels the conclusion that "no reasonable trier of fact could find the works substantially similar." Walker, 784 at 48. Plaintiffs' infringement claim must therefore be dismissed.

CONCLUSION

The defendants' June 15, 2007, motion to dismiss is converted to a motion for summary judgment and is granted. An Order to be issue in connection with this Opinion will establish a schedule for addressing the defendants' request for costs and fees pursuant to 17 U.S.C. § 505.

SO ORDERED.

Dated: New York, New York
December 3, 2007

/s/

DENISE COTE
United States District Judge

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Nos. 08-0655-cv(L) and 08-2280-cv(CON)

[Filed August 19, 2009]

CLIFTON MALLERY, a/k/a/ ENJAI OMAA EELE, and AMNAU KARAM EELE,

Plaintiffs-Appellants,

v.

NBC UNIVERSAL, INC., NBC UNIVERSAL TELEVISION STUDIO, TAIL WIND PRODUCTIONS, TIM KRING, DENNIS HAMMER, ALLAN ARKUSH, JEPH LOEB, and BRYAN FULLER,

Defendants-Appellees.

Before HON. ROGER J. MINER, HON. ROBERT A. KATZMANN, and HON. REENA RAGGI, *Circuit Judges*.

PER CURIAM:

The petitioner(s) for rehearing filed by Appellants is DENIED.

ENTERED FOR THE COURT:

s/ RICHARD ALCANTARA
Deputy Clerk

APPENDIX H

Example of side by side visual substantial similarity of NYC artist Enjai Eele a/k/a Idai Markus in his studio vs respondents NBC Heroes pilot script of NYC artist Isaac Mendez in his art studio <http://www.dbuu.com/scan02.pdf>

[See Foldout Page]

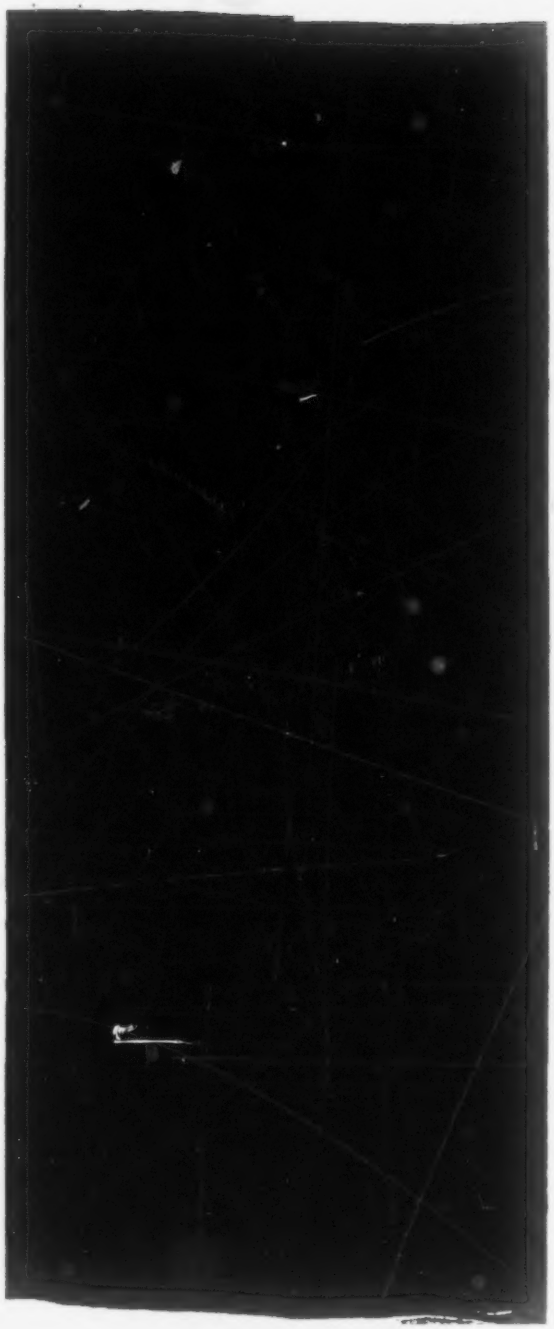


Image:Symbol.jpg

From Heroes Wiki

- Image
- File history
- Links
- Metadata

No higher resolutions available.
Symbol.jpg (450 × 350 pixel, file size: 7 KB, MIME type: image/jpeg)

The Symbol which appears throughout *Heroes*

redrawn by user:Cdhamrison, resized for category:Tattoos

File history

Click on a date/time to view the file as it appeared at that time.

	Date/Time	User	Dimensions	File size	Comment
current	20:04, 21 December 2006	Hardvice (Talk | contribs)	450×350	7 KB	The Symbol which appears throughout "Heroes". redrawn by user:Cdhamrison, resized for category:Symbols Category: Symbols Images

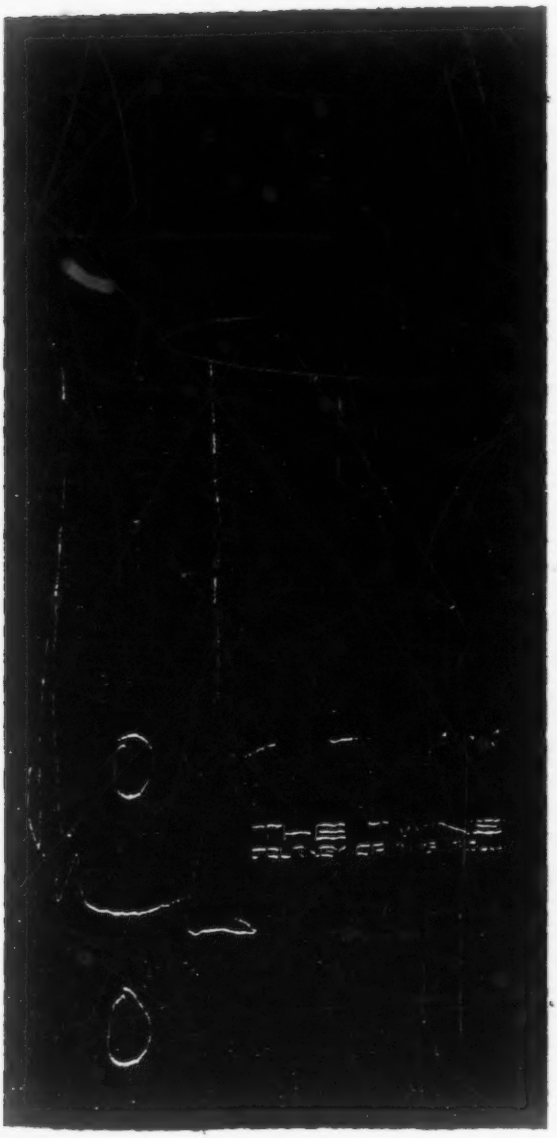
- "In an interview concerning the Symbol, Tim Kring says, "I would just say that part of the fun of watching the show is seeing how certain things crop up. And if you look at that symbol carefully, you might be able to figure it out. By the way, the symbol also shows up in places viewers can't see. On the door of a room in the soundstage where *Heroes* shoots, the sign reads 'PROPS' — with that special S as the symbol."

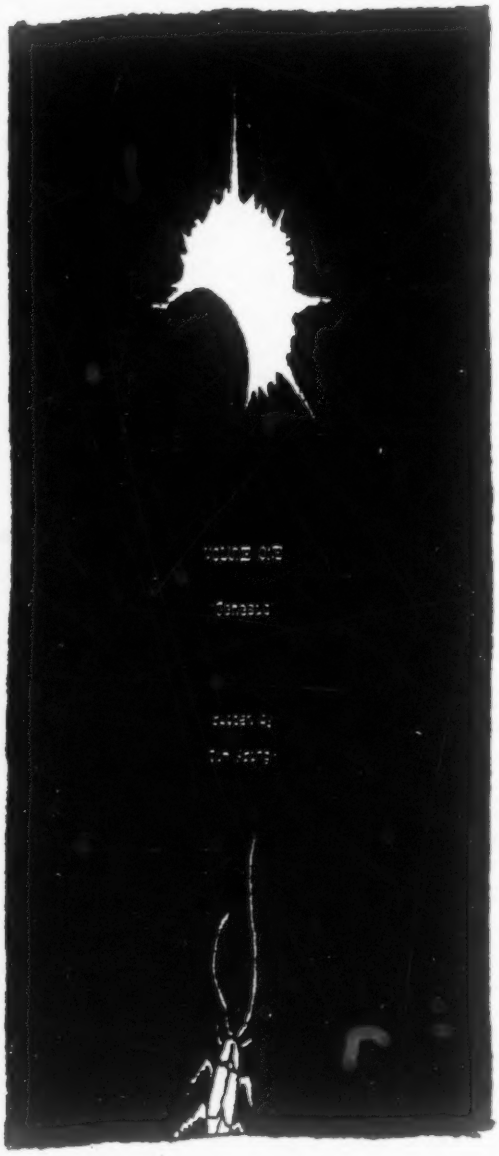
BEST AVAILABLE COPY

APPENDIX I

Example of side by side visual substantial similarity of cover of petitioners' script vs respondents' NBC Heroes script cover

[See Foldout Page]





NOTE:

AFTER THE TWINS

ENJAJ & AMNAJ EELE,

TIM KRUNG IS THE

ONLY WRITER IN THE

HISTORY OF HOLLYWOOD

TO ADD ART TO A SCRIPT.

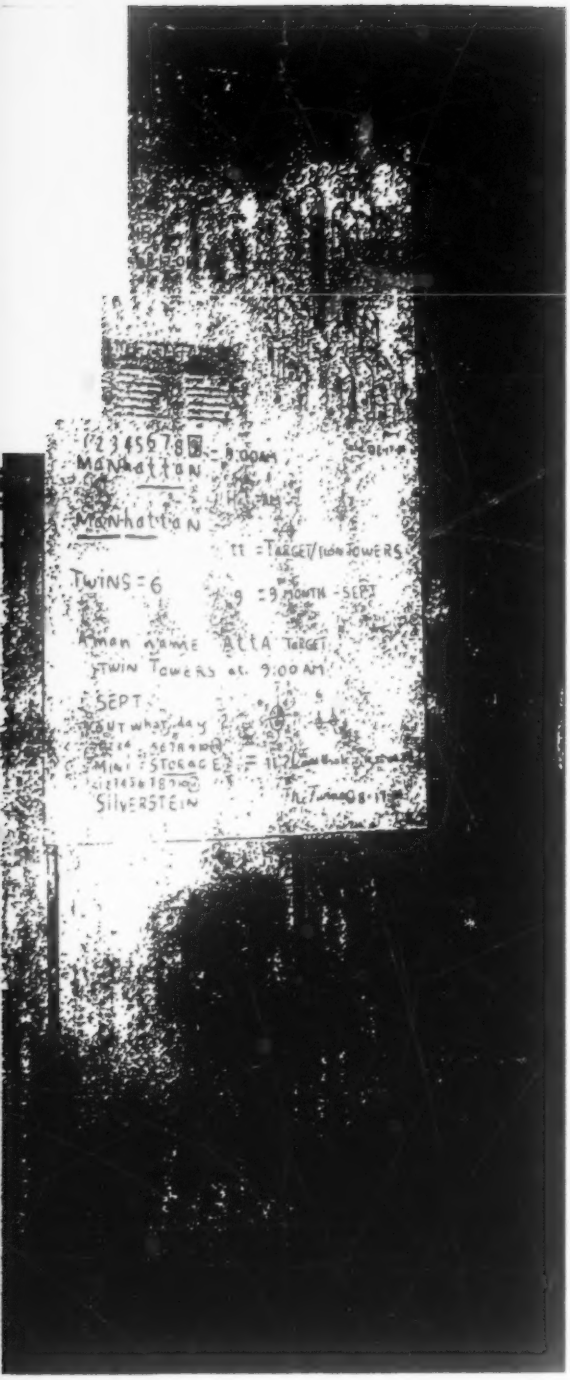
[redacted]

SC: I thought it was very
[illegible]. I've lived in different
[illegible]. I've been South America
but I grew up in Europe mostly
and I thought that people from
all over the world would like it.
Also there was a lot of
connections on different people
would have their favorites and
identify with each one in the
story. I really liked that there
were a few drawings already in
the script, which you don't
normally see, like in the
chapter pages and the
introduction. They were simple
drawings but it just gave it a
feel and an atmosphere in a
gritty entertainment way which really stood out for me

APPENDIX J

Example of side by side visual substantial similarity of petitioner Enjai Eele's painting titled: "Twice" and respondents' NBC Heroes Issac Mendez painting

[See Foldout Page]



writing the pilot. I told him I wanted to include some artwork in the script as a sales device. Basically, I wanted to hire an artist out of my own pocket to do just a few pieces for the script. So, I asked Jeph to send me a couple of people and he got me in touch with Tim.

Note: TIM SALE does ALL ACTION HEROES And he's NEVER PAINTED ON LARGE CANVAS

http://www.comicbookresources.com/news/newsitem.cgi?NE=8301 Better Heroes

Note: SKETCH OF ISAAC MENDEZ FROM TIM KRAINES HEROES SCRIPT 2006

BEST AVAILABLE COPY

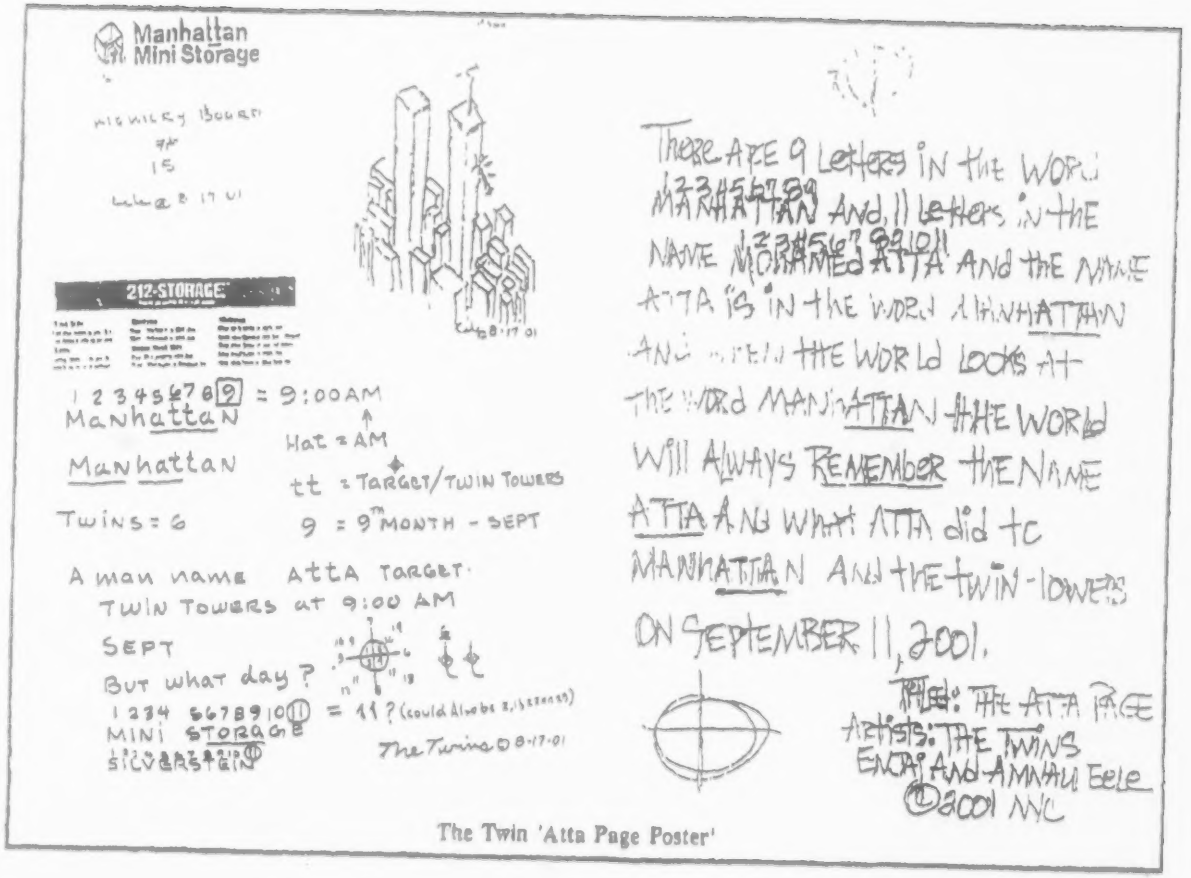
APPENDIX K

Couple to appeal verdict in infringement suit against NBC-TV unit

By J. Zamgba Browne

Special to NY Beacon

NEW YORK BEACON,
September 17, 2009 - September 23, 2009
newyorkbeacon.com



The Twin 'Atta Page Poster'

Amnau Karam Eele and Clifton Mallery, a husband and wife team who can paint and write the future, plan to appeal their multi-million dollar copyright infringement lawsuit after losing the case in U.S. District Court against giant NBC Universal Television Studio.

The couple, better known as the "The Twins," said they couldn't figure out how Justice Denise Cote could have possibly ruled against them when a member of the defense admitted in open court to copying their material.

"What Judge Cote's decision really means," said Eele, "is that your intellectual property is no longer protected. It also means that NBC can come to your book signing, take your copyrighted book and copy it, admit to doing so in a court of law and then turns around and awards NBC a victory,"

"The ruling further means that NBC will own our copyright 100 percent, because the presiding Judge and NBC attorneys reduced our copyrighted intellectual property to a mere idea' and a 'classic scene affairs' that could be found in any work in Hollywood," said Eele. The twins plan to appeal the decision all the way to the U.S. Supreme Court if necessary.

The material, according to the complaint filed in the U.S. District Court in Manhattan, was used in a popular NBC drama series, "Heroes." Prior to the hearing, NBC reportedly agreed to a $750,000 settlement which was rejected by the Twins.

The lawsuit alleged that two individuals, who identified themselves as writers from NBC, took copies of the twins' work from a 2005 exhibition at Hunter College in Manhattan.

The series, Heroes, tells the story of a recovering heroin addict, Isaac Mendez (Santiago Cabreera) who discovers he has the ability to slip into a deep trance and paint scenes from events that haven't yet happened.

The Twins charged in court papers that some of the characters in the NBC drama series are "strikingly similar" to ones they created in their story and artwork titled, "an artist who can paint the future." The work includes prediction of the destruction of two prominent New York City buildings.

Eele and Mallery said they were convinced the NBC drama series is based on their work because they too have over the years predicted the future through writings and art forms which they created.

They cited a painting, "The Atta Page, which they developed shortly after moving to New York City from Texas. The painting depicts the destruction of the World Trade Center months before it happened with the following message:

"There are nine letters in the word Manhattan and 11 letters in the name Mohammed Atta. Atta was the ringleader in the terrorist attacks on the World Trade Center," Eele explained.

"Whenever one looks at the word Manhattan, he or she will remember the name 'Atta' and what he did to

the twin towers on Sept. 11, 2001," she added. Eele said the painting also depicts the warning that, "A man named Atta will attack the World Trade Center twin towers at 9 a.m. on Sept. 11, 2001."

Eele said she and her twin partner started a grassroots movement and took their work to Union Square in Manhattan aimed at warning as many people as possible about the meaning of their art work and a possible attack on the World Trade Center.

"Many people laughed at us, saying we are weird and crazy. Others thought we were religious fanatics, while others tore up our 'Atta Flyers' that were being passed out in the Union Square area," Eele continued.

She said the police "even threatened to send us to Bellevue Hospital for psycharitic examination as they labeled us as out of town artists." Eele said a friend suggested that they take their work to a Tribeca Film festival that was in progress in SoHo which they did.

"Our work on the destruction of the Trade Center was returned to us by the festival," with no explanation, said Eele. She also said that on April 22, 2005, she and her twin partner were invited to Hunter College to show a film they had developed, titled," The Letter" to show the students.

At Hunter College, the twins discussed what it meant to be an artist, especially one who has the ability to paint and write the future, and how and why they created a fictional character called "Idai Markus" based on their real life experiences.

"Several NBC writers showed up at our show uninvited," said Eele. After the show, Eele said she and her partner watched as a few of them took some free materials from a table we had set up in the lobby area for students.

She said a lawyer whom they had retained told them, "Your story and art work" are going to be on a new NBC-TV show called "Heroes." The twin said they decided to watch the show and sure enough, "it had our characters, and art work with story line, "The NYC Artist who can paint the future" written on a giant size canvas. "We immediately contacted our attorney to begin legal proceedings against NBC," said Eele.

A lawsuit was field in their behalf, but they lost the case. In her decision, Justice Cote ruled that the twin failed to substantiate their claim that NBC stole their work.

Furthermore, Judge Cote said in essence, that the Twins' copyrighted material was a "mere idea and classic scene affairs" that could be found in any work in Hollywood and therefore NBC had the right to use it.

Judge Cote also ruled in a counter lawsuit by NBC that the Twins pay NBC the sum of $99,106.45 in attorney fees and court cost.

APPENDIX L

E-mail from John Coleman to Marcia Paul,
the Twins declined settlement

Begin forwarded message:

From: "John A. Coleman, Jr."
coleman@fccplaw.com>
Date: December 17, 2007 1:05:26 PM EST
To: Marcia Paul <marciapaul@dwt.com>
Subject: Mallery v. NBC

Marcia:

My clients decline NBC's settlement offer.

John

John A. Coleman, Jr.

Friedberg Cohen Coleman & Pinkas, LLP

444 Madison Avenue
Suite 805
New York, New York 10022
Tel (212) 829-9090
Fax (212) 829-0999

****
****

APPENDIX M

(S.D.N.Y), *aff'd*, 738 F.2d 419 (2d Cir. 1984).

> plaintiffs' artist who can paint the future is not just an idea, he's a fully expressed character, particularly in plaintiffs' 777-page novel. The reader learns of Idai's birth, upbringing, and ultimately central struggle with his divination art and how to relay his prophesies to others – the very struggle that Isaac Mendez faces on defendants' show.

Pl. Br. at 19. This statement succinctly demonstrates plaintiffs' fundamental misunderstanding of the idea/expression dichotomy.

Defendants do **not** dispute that Idai is a fully developed character in plaintiffs' novel, and that the expression of his character is complex and, to some extent, original.

APPENDIX N

[p.13]

95JVMALC Argument

JUDGE RAGGI: The district judge acknowledged that your client had a copyright; so we don't have to be concerned that she didn't understand that, right?

MR. CONFUSIONE: No, I agree.

JUDGE RAGGI: And similarly, she acknowledged the attendance at the event where an NBC representative, I believe it was, had an occasion to see the film; so we know she understood that.

MR. CONFUSIONE: Right. I agree. And I submit actual copying has been determined at this stage, again, at the procedural posture at this stage. The only question is whether or not the things he copied were unlawful. And in my view, I think the Court could not decide as a matter of law that

JUDGE RAGGI: Do you want to respond at all to counsel's argument that this is just an idea, that it's just an idea about the context of the character?

MR. CONFUSIONE: Again, I think I refer again to the illustrations I made in the brief about the surfer. If it was just an idea, why did the idea, in other words, track to many different characteristics of the way the idea was expressed in the plaintiff's work. It tracked

too many of them. And, again, I would rely on *Feist* and the rug cases, which I think those rationales are very relevant here.

JUDGE RAGGI: OK. I think we have your argument. We'll take the case under advisement. Thank you. (Adjourned)

APPENDIX O

Tim Kring - Heroes
http://blog.the-eg.com/2007/12/04/tim-kring/

Creator of Heroes. How it got started,

Had the format, just needed an idea. My wife an I are raising kids, I've become obsessed and concerned with the way the world is these days, and what they'll be inheriting. Where will the heroes come from? We can't rely on government or institutions.

I lied and cheated and schemed and manipulated all the way through the idiocy that is the notes process when you do this, was able to push the production through relatively unscathed and in the form that it would work in. I finally gave that kid who stares out the window a voice. That's how Heroes got on the air.

It's not the most original idea in the world, you build and borrow. Just put these pieces together in the right way, at the right time, and on the right network.

Rebel Alliance
http://www.fastcompany.com/magazine/125/rebel-alliance.html

BY DAVID KUSHNER Fri Apr 11, 2008 at 11:46 AM

How a small band of sci-fi geeks is leading Hollywood into a new era.

Tim Kring, the lanky, goateed guy at the head of the table, created *Heroes,* NBC's hit television show about superpowered people.

"We are literally making up the parameters of the intellectual property that will take the networks into the next generation," Kring says. The others nod in agreement. "We're the beta-testing ground. It's a Wild West: There are no rules. Just take something that sounds cool and go try it."

No. 09-999

Supreme Court, U.S.
MAR 25 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CLIFTON MALLERY a/k/a ENJAI OMAA EELE
and AMNAU KARAM EELE,

Petitioners,

—v.—

NBC UNIVERSAL, INC., NBC UNIVERSAL TELEVISION STUDIO,
TAIL WIND PRODUCTIONS, TIM KRING, DENNIS HAMMER,
ALLAN ARKUSH, JEPH LOEB and BRYAN FULLER,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

HILARY LANE
NBC UNIVERSAL, INC.
Legal Department
30 Rockefeller Plaza
New York, New York 10122

MARCIA B. PAUL
Counsel of Record
LACY H. KOONCE, III
DAVIS WRIGHT TREMAINE LLP
1633 Broadway
New York, New York 10019
(212) 489-8230
marciapaul@dwt.com

Counsel for Respondents NBC Universal, Inc. and NBC Universal Television Studio

QUESTIONS PRESENTED

Whether the Second Circuit correctly affirmed the grant of summary judgment to defendants on the issue of substantial similarity, where the decision of the district court was based solely upon, and fully supported by, a careful comparison and analysis of the parties' respective works under the long-established standards for determining substantial similarity of protectable expression?

Whether the Second Circuit correctly affirmed the grant of summary judgment to defendants where the district court converted defendants' motion to dismiss into a motion for summary judgment without advance notice, in circumstances where it was evident that conversion might occur and where no prejudice resulted?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondents NBC Universal, Inc. and NBC Universal Television Studio make the following disclosure: NBC Universal, Inc. is owned (through intermediate entities) by General Electric Company and Vivendi Universal, S.A., both of which are publicly held corporations. No other publicly held company owns more than 10% of the stock of NBC Universal, Inc. NBC Universal Television Studio is a division of NBC Universal, Inc.

In addition to Respondents NBC Universal, Inc. and NBC Universal Television Studio, Petitioners also named Tail Wind Productions, and individuals Tim Kring, Dennis Hammer, Allan Arkush, Jeph Loeb and Bryan Fuller as defendants. None of these defendants were ever served.

TABLE OF AUTHORITIES

Cases PAGE

Bridgeport Music, Inc. v. UMG Recordings, Inc., 585 F.3d 267 (6th Cir. 2009) 11, 12

Cortec Industries, Inc. v. Sum Holding LP, 949 F.2d 42 (2d Cir. 1991) 14

Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991) 15

Gurary v. Winehouse, 190 F.3d 37 (2d Cir. 1999) 7, 14

Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985) 11

Hoehling v. Universal City Studios, Inc., 618 F.2d 972 (2d Cir. 1980)..... 15

Mallery v. NBC Universal, Inc., No. 07 Civ. 2250, 2007 WL 4258196 (S.D.N.Y. Dec. 3, 2007), *aff'd*, 331 Fed. Appx. 821 (2d Cir. 2009) 4

Mallery v. NBC Universal, Inc., No. 07 Civ. 2250, 2008 WL 719218 (S.D.N.Y. Mar. 18, 2008), *aff'd*, 331 Fed. Appx. 821 (2d Cir. 2009) 12

Sid & Marty Krofft Television v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1997) 11

PAGE

Twentieth Century Fox Film Corp. v. MCA, Inc., 715 F.2d 1327 (9th Cir. 1983) 11, 12

Walker v. Time Life Films, Inc., 784 F.2d 44 (2d Cir. 1986) 11, 15

Yurman Design, Inc. v. PAJ, Inc., 262 F.3d 101 (2d Cir. 2001) 6

Statutes

17 U.S.C. § 505 6

18 U.S.C. § 1343 10

28 U.S.C. § 1254(1) 1

Other Authorities

Fed. R. Civ. P. 12(b)(6) 4, 6, 13, 14

Fed. R. Civ. P. 56 ..... 4, 14

Sup. Ct. R. 15 8

Sup. Ct. R. 29.6 ii

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents NBC Universal, Inc. and NBC Universal Television Studio ("NBCU") respectfully submit that this Court should deny the petition for certiorari filed by Petitioners Clifton Mallery a/k/a Enjai Omaa Eele and Amnau Karam Eele ("Petitioners") for the reasons outlined below.

JURISDICTION

The judgment of the Court of Appeals was entered on June 3, 2009. Petitioner filed a Petition for Re-Hearing *en banc* on June 17, 2009, which was denied on August 19, 2009. The petition for writ of certiorari was filed on November 17, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 331 Fed. Appx. 821 (2d. Cir. 2009) and reproduced in the Appendix at A. The opinion of the district court is comprised of two unreported rulings: the first, issued December 3, 2007, is reproduced in the Appendix at F, and the second (awarding prevailing party attorneys fees), issued on March 18, 2008, is reproduced in the Appendix at C.

PRELIMINARY STATEMENT

Petitioners' petition for writ of certiorari fails to present either a split in the Circuit Courts or an important issue of federal law that requires this Court's review of the decision below. The Court of Appeals simply affirmed the grant of summary judgment dismissing Petitioners' copyright infringement claim based upon a careful comparison and analysis of the parties' respective works by the district court, under the applicable standards. The cases Petitioners cite as creating a Circuit split merely reached different results, on different facts, under the self-same standard.

Petitioners also argue that the district court granted summary judgment "without notice", and that it was error for the Court of Appeals to affirm, presumably referring to the conversion of Respondents' motion to dismiss into one for summary judgment. The Court of Appeals properly held that specific notice is not required where appellant should reasonably have recognized the possibility that the motion might be converted, and was not taken by surprise or deprived of reasonable opportunity to meet facts outside the pleadings. Here, because the motion was decided by reviewing only materials referenced in the pleadings (the allegedly infringed and infringing works), Petitioners were not deprived of an opportunity to meet facts outside the pleadings. The law on this point is clear and settled, and Petitioners have not raised an important issue of federal law or identified a Circuit split in connection with this or any other issue.

COUNTERSTATEMENT OF THE CASE

A. Factual Background

Petitioners are a husband and wife team who claim to have supernatural powers including painting and writing about events prior to their occurrence; for example, Petitioners claim to have predicted the September 11, 2001 attack on the World Trade Center. Petitioners' complaint alleged that defendants' television series *Heroes* infringes three different creative works authored by Petitioners: a short film, a semi-autobiographical novel entitled *The Twins: Journey of the Soul* ("*Journey*"), and a series of paintings. Only the novel was registered for copyright protection.

Petitioners' novel is a hand-transcribed, unpublished, 777-page work that the district court described as "sprawling and mystical" in tone. The district court further described it as an "undifferentiated stream of description and dialogue without guiding punctuation [which] shifts repeatedly between various settings, including Louisiana, Cuba, Miami, Texas, Africa, Paris, New York and more ethereal realms." The subplots of *Journey* are complex and densely populated, and involve, *inter alia*, supernatural elements, celestial conflicts between divinities, drug warfare, and ritual killings. In the novel, one of the characters creates paintings and sketches of future events.

By contrast, as described by the district court, Respondents' television show *Heroes* is "an hour-long, weekly television drama about ordinary people who discover that they possess unexpected powers, and the complications, adventures and dangers that follow". The overall tone of the show

is serious, but there are comedic elements, and the narrative is typically fast-paced. As the court noted, *Heroes* has been compared to a televised graphic novel or comic book: the series is not only structured like a comic book, it also contains thematic elements further tying it to that genre.

Petitioners' complaint alleged that certain elements are common to plaintiffs' works and *Heroes*: a minority artist who paints the future on large-scale oil-on-canvas paintings, including two landmark New York buildings being destroyed, which he attempts to stop; a depiction of a bus exploding, which is "validated" by news media; and the use of cosmograms, eclipses, twin characters, New York City, characters from Texas, global genetic changes, and close up eye images. Based on these scattered, alleged similarities in ideas, Petitioners claimed copyright infringement.

B. The Decisions Below

1. *The District Court Proceedings*

NBC filed a motion to dismiss in the district court pursuant to Fed. R. Civ. P. 12(b)(6), arguing that a comparison of the allegedly infringed and infringing works referenced in the complaint showed no substantial similarity of protectable expression. On December 3, 2007, the district court issued its decision, converting NBC's motion to dismiss into a motion for summary judgment pursuant to Fed. R. Civ. P. 56, and dismissing all of plaintiffs' claims. *Mallery v. NBC Universal, Inc.*, No. 07 Civ. 2250, 2207 WL 458196 (S.D.N.Y. Dec. 3, 2007), *aff'd*, 331 Fed. Appx. 832 (2d Cir. 2009).

The district court found that the works at issue are not substantially similar because "nearly every instance of alleged similarity between *Heroes* and the plaintiffs' work relates to unprotectable ideas rather than protectable expression". (*Id.* at *6.) The court reached this result through a careful analysis and comparison of the parties' respective works. (*Id.* at *6-9.) The court analyzed all of the similarities plaintiffs had identified and determined that regardless of whether these alleged similarities were viewed separately or in the aggregate as part of the overall "total concept and feel, theme, characters, plot, sequence, pace and setting" of the works, there was no actionable similarity. (*Id.*)

The court first addressed plaintiffs' primary assertion that *Heroes* was substantially similar to *Journey* because of alleged similarities between characters in each work who can "paint the future". The court found each of the allegedly similar elements to be similar at the level of idea only, and that most of these alleged similarities were unprotectable scènes à faire. (*Id.* at *6-7.) The court also compared the "total perception" of the two characters, finding that they "could hardly be more different". (*Id.*) The district court found that plaintiffs' litany of other alleged similarities were also merely unprotectable ideas, and that there was no similarity of expression in the characters, plot, mood, structure and style of the works. (*Id.* at *7.) The Court held that once "beyond th[e] level of abstraction", any alleged similarity between the works disappeared, because they were "not similar in mood, details, characterization, and, indeed, differ in nearly

every relevant way", and because those works have substantially different context, plot lines, narrative structure, and style. (*Id.* at *8.)

Although defendants moved to dismiss the complaint pursuant to Rule 12(b)(6), the district court found that "in light of the arguments presented, [the] motion is properly treated as a motion for summary judgment" (*Id.* at *2, *citing Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101, 108 (2d Cir. 2001)). The arguments raised before the district court were "focused almost exclusively" on the questions of "whether the alleged similarities relate to noncopyrightable elements and whether any reasonable observer could consider the works substantially similar". (*Id.*) The court observed that while notice to the parties is ordinarily required, the parties in this case should have reasonably anticipated that the motion might be converted given the arguments raised and, perhaps most importantly, that neither party had been or could be prejudiced by the conversion, because the works in question were the only documents necessary to be reviewed in order to resolve the motion. (*Id.*)

On March 18, 2008, the district court granted NBC's motion for prevailing party attorneys fees pursuant to 17 U.S.C. § 505, and awarded NBC $99,106.45. This award is not the subject of the instant petition.

2. *The Court of Appeals Decision*

On June 3, 2009, the Court of Appeals for the Second Circuit issued a Summary Order affirming the decisions of the district court. *Mallery v. NBC Universal, Inc.*, 331 Fed. Appx. 821 (2d Cir. 2009).

In its Order, the Court first addressed the conversion of Respondents' motion into a motion for summary judgment, citing *Gurary v. Winehouse*, 190 F.3d 37, 43 (2d Cir. 1999) for the proposition that although a court "generally should give parties specific notice of its intent to convert a motion to dismiss into a motion for summary judgment, specific notice is not required in all circumstances". *Id.* at 822. It held that "[t]he essential inquiry is whether the appellant should reasonably have recognized the possibility that the motion might be converted into one for summary judgment or was taken by surprise and deprived of reasonable opportunity to meet facts outside the pleadings". *Id.* (internal quotation marks omitted). The Second Circuit concurred with the district court's determination that, in the instant case, Petitioners (who were represented by counsel) should have reasonably anticipated conversion and were not prejudiced by same, because the works in question were before the Court. *Id.*

The Court of Appeals then affirmed on the basis that "[s]ummary judgment was appropriate in this case because no reasonable jury could find that there was substantial similarity between Defendants' television series, *Heroes*, and the original, protectable elements of Plaintiffs' works." *Id.* at 822-23. It further specifically held that "[t]he few and isolated similarities that Plaintiffs have identified are unprotected ideas or scènes à faire." *Id.*

C. Petitioners' Additional Submissions To The Court Of Appeals

Petitioners filed a Petition for Re-Hearing *en banc* on June 17, 2009. They then filed several applications for permission to submit additional

written materials in connection with that Petition. The additional materials consisted of an assortment of newspaper articles and some material from the record below, both annotated with plaintiff's handwritten comments in the margins. These materials were apparently submitted on the issue of access, which had been conceded for the purposes of defendants' motion. The first was granted by the Court of Appeals on June 16, 2009; the second was granted on July 6, 2009, but the Court stated that no further applications for supplementation would be entertained.

Petitioners thereafter filed an application in the Court of Appeals for an emergency injunction seeking to compel NBCU to remove Petitioners' likenesses and names from a website owned not by NBCU, but by a third party. Petitioners also filed a request for permission to submit additional written materials in connection with their application for an emergency injunction. The application for an emergency injunction was denied by the Court of Appeals as moot on September 9, 2009. That order does not appear to be a subject of the instant petition.

D. Petitioners' Mischaracterizations of the Facts and the Record Below

Rule 15 of the Rules of the Supreme Court states that "the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted". Here, the Petition is replete with outright falsities concerning both the underlying facts and the proceedings below.

First, Petitioners restate the allegations of the Complaint and characterize them either as findings of the district court or as facts that were not in dispute. For example, they state that NBC representatives attended an art exhibit and film screening where Petitioners' work was available, and "took the petitioners [sic] copyrighted IP" and used it to create an infringing character (Petition, pp. 3, 10), and separately that Respondents do not dispute that NBC representatives attended the exhibit and screening and "accessed and copied" Petitioners' work (Petition, p. 10-11). They also state that "[t]he respondents . . . admitted to using the artist that can paint the future and artwork in the pilot script as a sale device to pitch 'Heroes' to NBC network." (Petition, p. 17.) The district court made no such findings, and NBCU denies these allegations; as noted, it did concede access solely for the purpose of its motion to dismiss.

Second, Petitioners not only improperly disclose privileged settlement communications, they misstate the substance of those discussions. For example, Petitioners state that NBCU through its counsel made a settlement offer of a specific dollar amount on May 7, 2007. (Petition, p. 3.) NBCU never offered any money to Petitioners. Respondents strenuously object to the disclosure of settlement communications to this Court, and to Petitioners' wholesale fabrication of the contents of such communications.

Third, Petitioners cite to materials submitted in connection with their Petition for Re-Hearing *en banc* in the Court of Appeals and in connection with their request for an emergency injunctions in that same Court, as if those materials were part of

the record before the district court, or are admitted facts. For example, based upon this material Petitioners state that Tim Kring "admitted" copying or "guilt" publicly (Petition, pp. iii, 11, 18); and that a website owned by a third party upon which NBCU advertisements for *Heroes* merchandise appear uses "petitioners [sic] likeness from a New York Daily newspaper article. . . ." (Petition, pp. 17-18.) Petitioners assert that the Court of Appeals "ignored" this "evidence." (Petition, p. 9.) This is simply false, as those submissions were not based on any evidentiary material proferred in the trial court, and regardless, as noted above, the Court of Appeals accepted and reviewed Petitioners' submissions but rejected the arguments contained therein, denying both the Petition for Re-Hearing *en banc* and the request for an injunction, as moot. Respondents object to Petitioners' attempt to place these materials before this Court as "facts" in the record below. Further, review of those materials demonstrates that Mr. Kring did not admit copying Petitioners' (or anyone's) copyrighted works (Petition, Appendix O).

Finally, Petitioners appear to be alleging a RICO claim under 18 U.S.C. 1343 (Petition, p. 19), but this claim was not raised either in the district court or the Court of Appeals, and has no basis in law or fact.

REASONS FOR DENYING THE PETITION

Petitioners' petition for writ of certiorari fails to present either a split in the Circuit Courts or an important issue of federal law that requires this Court's review of the decision below. The Court of Appeals in this case affirmed a summary judgment dismissing Petitioners' copyright infringement claim that was fully supported by a careful comparison and analysis of the parties' respective works by the district court, under the applicable standards, most significantly the fundamental copyright tenet that only protectable elements of a plaintiff's work are relevant to the substantial similarity analysis. *See, e.g.s., Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 548 (1985); *see also Walker v. Time Life Films, Inc.*, 784 F.2d 44, 48 (2d Cir. 1986); *Sid & Marty Krofft Television v. McDonald's Corp.*, 562 F. 2d 1157, 1162-63 (9th Cir. 1997). The Court of Appeals properly affirmed, concluding that summary judgment was appropriate because no reasonable jury could find that there was substantial similarity between the parties' respective works.

Petitioners argue that there is a Circuit split, citing the Ninth Circuit Court of Appeals decision in *Twentieth Century Fox Film Corp. v. MCA, Inc.*, 715 F.2d 1327 (9th Cir. 1983) and the Sixth Circuit Court of Appeals decision in *Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F.3d 267 (6th Cir. 2009).

However, in *Twentieth Century Fox*, the Ninth Circuit merely found, after a review of the works in question, that the question of substantial similarity between the works was "a close enough

question that it should be resolved by way of a trial". The Ninth Circuit made clear that its decision in the case did "not imply that summary judgment is never appropriate in copyright infringement actions", and allowed that "summary judgment for defendant is appropriate where works are so dissimilar that a claim of infringement is without merit". 715 F.2d at 1329-1330. That was precisely the case here. Indeed, the district court found that there was "profound dissimilarity" between the works, such that Petitioners' claims were objectively unreasonable, warranting an award of attorneys fees. *Mallery v. NBC Universal, Inc.*, No. 07 Civ. 2250, 2008 WL 719218, *2 (S.D.N.Y. Mar. 18, 2008), *aff'd*, 331 Fed. Appx. 821 (2d. Cir. 2009). Far from constituting a Circuit split, the decision in instant case and *Twentieth Centrury Fox* are fully consistent.

Also consistent is *Bridgeport Music*, a Sixth Circuit decision which Petitioners cite in part for the proposition that "fragmented literal similarity" may be the basis for a claim of copyright infringement here (Petition, pp. 15-17). The concept of "fragmented literal similarity", which is recognized by the Second Circuit as well, simply does not apply in this case, where the "scatter-shot" similarities asserted by Petitioners did not include any text (or graphics) that were literal reproductions, but rather vague themes, scenes a faire, and the like. *Bridgeport Music*, 585 F.3d at 275 ("random similarities scattered throughout the works are not a proper basis for a finding of substantial similarity" (citations and quotations omitted)). Petitioners also cite *Bridgeport Music* for its discussion of fair use (Petition, pp. 11-12),

but NBCU did not assert fair use as a defense in connection with its motion to dismiss, nor did the district court dismiss the action on that ground. Thus there is no split between the Second and Sixth Circuits on either point.

Petitioners have not presented any reason to overturn longstanding law and find summary judgment inappropriate here. While Petitioners argue that Court of Appeals should have rejected the district court's finding that the character Isaac in NBCU's television program was not substantially similar to the character Idai in Petitioner's novel, the district court carefully analyzed Petitioners' claim that both characters could "paint the future", and found that the concept of painting the future was a mere idea, and unprotectable. The district court found instead that the total perception of the two characters could hardly be more different. Nor does Petitioners' claim that Idai was based on Petitioner Clifton Mallery's real-life persona (*e.g.*, Petition, p. 18) alter that analysis in any way.

Petitioners also argue that the grant of summary judgment "without notice" was error, presumably referring to the conversion of Respondents' Rule 12(b)(6) motion into a motion for summary judgment. A district court's authority to convert a motion to dismiss into one for summary judgment pursuant to Rule 12(d) in appropriate cases is clear and settled. The Petition thus does not raise an important issue of federal law or an issue that is the subject of a Circuit split, on this basis. As the Second Circuit held, while preferred, specific notice of conversion is not required in all circumstances, especially where "the appellant

should reasonably have recognized the possibility that the motion might be converted into one for summary judgment" and is not "taken by surprise and deprived of reasonable opportunity to meet facts outside the pleadings." *Gurary*, 190 F.3d at 43. As stated in *Cortec Industries, Inc. v. Sum Holding LP*, 949 F.2d 42, 47 (2d Cir. 1991):

> A finding that plaintiff has had notice of documents used by defendant in a 12(b)(6) motion is significant since . . . the problem that arises when a court reviews statements extraneous to a complaint generally is the lack of notice to the plaintiff that they may be so considered; it is for that reason—requiring notice so that the party against whom the motion to dismiss is made may respond—that Rule 12(b)(6) motions are ordinarily converted into summary judgment motions. Where plaintiff has actual notice of all the information in the movant's papers and has relied upon these documents in framing the complaint the necessity of translating a Rule 12(b)(6) motion into one under Rule 56 is largely dissipated.

Here, the only materials the court considered on the motion were incorporated in the complaint by reference (that is, the infringing and infringed works themselves). The courts below were therefore correct in finding that Petitioners were not deprived of an opportunity to meet facts outside the pleadings and could not have been surprised or prejudiced.

Whether on motion to dismiss or on motion for summary judgment, it is entirely appropriate for a court to make a determination of infringement or lack thereof as a matter of law, based solely on a comparison of the works in question, assuming access has been conceded for the purposes of the motion, as it was here. *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 977-80 (2d Cir. 1980); *see also Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 US 340 (1991) (reversing grant of summary judgment to plaintiff and finding that defendant's work was not infringing where it only reproduced unprotected facts). This is especially true where the alleged similarities concern only unprotectable elements of the allegedly infringed work, as the district court correctly found here. *See Walker v. Time-Life Films, Inc.*, 784 F.2d 44, 48 (2d Cir. 1986). Here, because the arguments raised before the district court were "focused almost exclusively" on the questions of "whether the alleged similarities relate to noncopyrightable elements and whether any reasonable observer could consider the works substantially similar", the district court found it appropriate to treat the motion as one for summary judgment and decide substantial similarity as a matter of law. The Court of Appeals properly affirmed.

CONCLUSION

The petition for a writ of certiorari should be denied because it presents neither a split in the circuit courts nor an important issue of federal law that requires this Court's review. There is no reason to delay consideration of the petition, and it should be promptly denied.

Respectfully submitted.

MARCIA B. PAUL
Counsel of Record
LACY H. KOONCE, III
DAVIS WRIGHT TREMAINE LLP
1633 Broadway
New York, New York 10019
(212) 489-8230

HILARY LANE
NBC UNIVERSAL, INC.
Legal Department
30 Rockefeller Plaza
New York, New York 10122

Counsel for Respondents

March 25, 2010

No. 09-999

In The

Supreme Court of the United States

CLIFTON MALLERY A/K/A ENJAI OMAA EELE,
AMNAU KARAM EELE,

Petitioners,

v.

NBC UNIVERSAL, INC., NBC UNIVERSAL TELEVISION STUDIO, TAIL WIND PRODUCTIONS, TIM KRING, DENNIS HAMMER, ALLAN ARKUSH, JEPH LOEB, BRYAN FULLER,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' REPLY BRIEF

CLIFTON MALLERY A/K/A
ENJAI OMAA EELE
AMNAU KARAM EELE
P.O. Box 20474
NEW YORK, NY 10011
212-330-7137
ecletwins10102002@yahoo.com

Petitioners pro se

April 14, 2010

TABLE OF CONTENTS

Table of Contents i

Table of Appendices i

Table of Cited Authorities iv

Statement in Reply to Brief in Opposition 1

Conclusion 12

TABLE OF APPENDICES

Appendix A: Appendix A -- The side by side comparison of Character and storyline. 1a

Appendix B: Appendix B -- Statement by Joann Vara, Emily Milias and Pierce Law Group LLP - legal clearance standards upheld by Copyright law, NBC and TV and Film industry 4a

Appendix C: Appendix C -- (See Interview: Harrison Wilcox - lotsofinterviews - http://www.lotsofinterviews.com/#/interviewharrison-wilcox/4531985068) - Clearance Exhibit - USUTU character . . 18a

Appendix D: Appendix D -- Use of artwork in script - interview by Tim Kring - 1-On-1: Talking with "Heroes" Creator Tim Kring - Comic Book Resources http://www.comicbookresources.com/?page=article&id=8146 - Russell Simmons "One World "magazine article titled: "Twin Hope" (Fold-Out Exhibit) 26a

Appendix E: Appendix E -- Copyrights for The Twins; Journey of the Soul ("Journey") copyrighted June 1, 2001 - registered April 13, 2007 and a short film excerpt from the "Journey" entitled: The Letter. copyrighted April 4, 2004 - registered September 20, 2006. (Fold-Out Exhibit) 30a

Appendix F: Appendix F -- NBC legal document dated Oct 23, 2006 (Tim Kring as original creator) 31a

Appendix G: Appendix G -- NBCU MARKET AFFILIATE - Jason Hill a/k/a "RUBIXCUBEMAN" - as A NBCU Linkshare Affiliate - Make Money Online at NBCU online at msnbc.com as a Market Affiliate. 33a

Appendix H: Appendix H -- See Marcia Paul Description of Services - face to face settlement meeting held on May 17, 2007, NOT May 7, 2007. . . . . 45a

TABLE OF CITED AUTHORITIES

Cases:

Bridgeport Music, Inc., and Southfield Music, Inc. v. UMG Recordings, Inc., and Universal Music Investments, Inc.,
No. 07-5596 (6th Cir. Nov. 4, 2009) 10

British Airways Bd. v. Boeing Co.,
585 F.2d 946 (9th Cir. 1978), *cert den.*, 440 US 981, 99 S. Ct. 1790 60, L. Ed 2d 241 (1979) . . . 1

Campbell v. Acuff-Rose Music, Inc.,
510 U.S. 569 (1994) 12

First Nat'l Bank of Ariz. v. Cities Serv. Co.,
391 U.S. 253, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968) 1

Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.,
562 F.2d 1157 (9th Cir. 1977) 1

Twentieth Century-Fox Film Corp. v. MCA., Inc.,
715 F.2d 1327 (9th Cir. 1983) 1, 5, 10

Statutes:

18 U.S.C. 1343 4

Fed. R. Civ. P. 56 (c) 1, 8

STATEMENT IN REPLY TO RESPONDENTS BRIEF IN OPPOSITION

Petitioners would like to reply to the respondents opposition. NBCU Attorney Marcia Paul asked in her "Brief in Opposition" "whether the second circuit correctly affirmed the grant of summary judgement to respondents on the issue of substantial similarity where the decision of the district court was based solely upon and fully supported by a careful comparison and analysis of the parties respective work" under long established standards.

Petitioners would like to state that in *Twentieth Century-Fox Film Corp. v. MCA Inc.*, 715 F.2d 1327 (9th Cir. 1983) the opinion of Law relating to a grant of summary judgement is clear.

Only if no genuine issue of material fact exists on the question of substantial similarity of idea and idea expression will the moving party be entitled to prevail as a matter of law Fed. R. Civ. P. 56(c). *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288-90, 88 S. Ct. 1575, 1592-93, 20 L. Ed. 2d 569 (1968).

Under Rule 56(c) the standard governing our review by the trial, (*British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 951 n. 6 (9th Cir. 1978) the court must view the evidence and inferences therefrom in the light most favorable to the non-moving party, herein petitioners. (The words "petitioners shown favor by the judge" was never used in relation to the petitioners). The court concluded that the films do in fact raise genuine issues of material fact as to whether only the Star Wars idea or the expression of that idea was copied. *Sid & Marty Krofft Television Prods., Inc. v.*

McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977). At a minimum, it was a close enough question that it was resolved by way of a trial.

Summary judgement is appropriate, where undisputed facts raise a complete defense as a matter of law, where both works are so dissimilar that a claim of infringement is without merit. This, however, is not such a case.

The court therefore should reverse and remand this case for trial. A CAREFUL SIDE BY SIDE VISUAL AND LITERAL COMPARISON AND ANALYSIS of the petitioners manuscript ("journey") and short film ("The Letter") and the respondents scripts and filmed episodes of "Heroes" shows that a genuine issue of material fact does indeed exist.

Starting with the visual substantial similarity of NYC artist Enjai Eele a/k/a Idai Markus the fictional copyrighted character and respondents NBC Heroes pilot script with character Isaac Mendez appear at Petition for Writ - Appendix H, I, J as well as 23 other visual and literal similarities. (See Support Material for Oral Argument, Volume I thru V, on Record in the Appeals Court appearing at Petition for Rehearing En Banc - received June 10, 2009 GRANTED June 16, 2009. (Character storyline comparison appear at APPENDIX A).

NBC's legal department has a long upheld established standard that attorney Marcia Paul and Hilary Lane of NBC's legal department should be well aware of, the company Clearance Domain and legal clearance documentation required in the TV and Film Industry.

Statements enclosed by former NBCU employee JoAnn Vara will demonstrate that NBC Hilary Lane and Marcia Paul should have presented legal clearance documents proving research, permission, Error & Omission insurance and legal clearance to use copyrighted elements of the petitioners intellectual property, or was NBCU using a double standard of law and justice, intentionally over looking these legal clearance standards to assist NBC in evading legal liabilities. (Statement by JoAnn Vara, Emily Milias and PIERCE LAWGROUP LLP – legal standards upheld by Copyright law, NBC and TV and Film industry appear at APPENDIX B).

In an interview with NBCU's employee Harrison Wilcox the Script Clearance Coordinator for NBC TV Series "Heroes", Mr. Wilcox discusses NBC's Legal Clearance Standards for "Heroes". He states: "Script Clearance deals more with the legal permissions and protections of the show. Every script written gets sent to a research company. That company does a full report on the script and sends that information back to us. Stuff like NAMES OF CHARACTERS IN RELATION TO REAL PEOPLE. Using that report I work with the writers and our lawyer SAFRONIA JOHNSON to make sure there is nothing in the scripts that shouldn't be there. I also work with Art Department, Props, Set Dec, Wardrobe, and Post, to make sure we have permission to use everything that goes on camera. If we don't have permission, I try to get it. If we can't get permission, I usually come up with fictional names for things. Costa Verde and Copy Kingdom are examples of this. That's basically what I do. NBC Standards do their own reports which everyone on the show makes sure to follow.

I'm very proud to say that I've been on Heroes since the pilot. I was hired as an Office Production Assistant - my first job in the industry - and moved into my current position by the middle of season one. Yes, I did have to get permission to use certain characters. Everyone always has to. I'm always wondering what happened to the characters that we haven't seen in a while. (See Interview:Harrison Wilcox - lotsofinterviews - http://www.lotsofinterviews.com/#/interviewharrison-wilcox/4 531985068 - Clearance Exhibit USUTU character appear at APPENDIX C.

Petitioners would like to say to the court that a careful comparison and analysis of *Mallery v. NBCU* would include: The legal clearance documents that Mr. Wilcox speaks of and Tim Kring admitting how he "lied, cheated, schemed and manipulated through the notes process to get Heroes on the air". "Its not the most original idea" "You build and borrow" "We are literally making up the parameters of intellectual property" "It's a wild west. There are no rules. Just take something that sounds cool and go try it." (See Petition for Cert Appendix O 56a, 57a) http://blog.the-eg.com/2007/12/04/tim-kring.

Petitioners have raised an issue of Federal law (18 U.S.C. 1343) that should land the respondent Tim Kring and his attorney Marcia Paul in prison if Tim Kring refuses to demonstrate to the courts where he "borrows" from and how he "lied and cheated" to get Heroes (a stolen copyrighted IP) on the air for massive profits for NBCU. This is not only Rico, it's wire fraud on a global level with global profits made by NBCU on a production "Heroes" that NBCU has no legal clearance documents for. (See Support Material for Oral Argument, on Rico Law - Volume I [cover letter

section] & Volume II, [section K]) on Record in the Appeals Court appearing at Petition for Rehearing En Banc - received June 29, 2009 GRANTED June 16, 2009.

There are no Legal documents of Errors and Omissions policies in NBCU's "brief in opposition" to the courts that cover the legal liability and defense costs for the production company against lawsuits alleging unauthorized use of title, format, IDEAS, CHARACTERS or plots, PLAGIARISM, unfair competition or piracy, alleged libel, slander, defamation of character or invasion of privacy. All distributors require production companies to obtain E&O insurance policy. (See Production Insurance - Film & TV - http://www.tvdco.com/home/filmDetail.

In Marcia Paul's preliminary statement, she claims that the petitioners fail to present a split in the Circuit Courts or an important issue of Federal Law under careful comparison and analysis under applicable standards. The petitioners state in both cases (*Mallery v. NBC*) and (*Fox v. MCA Inc.,*) the issue raised in the motion was whether defendants production was so dissimilar to plaintiffs works, as to both ideas and expression of those ideas, that no material issue of fact existed on the question of substantial similarity, and the question could it be decided as a matter of law. Fox argued in it's brief that a comparison of the two works discloses at least 34 similarities. In *Mallery v. NBC*, the two works discloses at least 23 similarities with no legal clearance. The defendants may prevail only if no genuine issue of material fact exists on the question of substantial similarity of idea and idea expression. The court intimate no opinion whether the films are substantially similar as to either idea or expression,

but state only that reasonable minds could differ on those key factual issues. Similarly, summary judgement for defendant is appropriate where works are so dissimilar that a claim of infringement is without merit. The court therefore reverse and remanded this case for trial.

The elements questioned in both respective works are not dissimilar, those copyrighted elements of the petitioners copyrighted IP have been incorporated and mainstreamed into the respondent work ("Heroes") as clear and distinct recognizable elements.

Why would any petitioner in any court of law "reasonably expect" a U.S. Judge to issue a "summary judgement" without notice when the respondent Tim Kring has no legal clearance and is in the media admitting he "lied, cheated, schemed and manipulated through the notes process to get Heroes on the air" that features a main character as "a artist that can paint the future with a drug problem, when the petitioner is a real life drug free artist that can paint the future whose work is exhibited in real life art galleries, museums, published in major magazines, newspapers, studied by academia professors with a fictional character named "Idai Markus, the NYC African American artist that can paint the future" based on the real life petitioner's life? (Russell Simmons "One World" magazine article titled: "Twin Hope" appear at APPENDIX D).

On factual background the Petitioner only claim infringement on two creative works, the petitioners manuscript entitled: The Twins; Journey of the Soul ("Journey") copyrighted June 1, 2001 - registered April 13, 2007 and a short film excerpt from the "Journey"

entitled: The Letter, copyrighted April 4, 2004 - registered September 20, 2006 appear at APPENDIX E.

NBCU legal department and Marcia Paul submitted a document dated Oct 23, 2006 stating that "the character of Issac Menendez (correctly spelled Issac Mendez) is an entirely original creation of (respondent) Tim Kring, the creator of this Series. Respondent Tim Kring told the media that Heroes, "it's not the most original idea" "you build and borrow". The petitioners would like to ask the court has respondent Tim Kring committed perjury in court with his "Heroes is not original" statement? (See Petition for Writ - Appendix O 56a) Document dated Oct 23, 2006 appear at APPENDIX F.

Petitioners true factual background as Luba Divination artists that can paint and write the future, came to NYC with a painting titled: The Atta Page (See Petition for Writ – Appendix H) to Join with other regular people with extra-ordinary abilities to stop terrorist Mohamed Atta from attacking two NYC landmark buildings in NYC BEFORE September 11, 2001. The petitioners were teaching their art form from their manuscript The Twins: Journey Of The Soul April 22, 2005 at Hunter College NYC, the NBCU representatives attended this show. (See Petition for Writ - Appendix N 54a [p.13]). Respondent Tim Kring stated in the media that before 2005 he had no ideas until Oct - Nov 2005, the two months he claimed he came up with "his original idea for the artist that could paint the future and regular people with extra-ordinary abilities trying to stop a nuclear blast by a terrorist in NYC against two NYC land marked buildings." The respondent Tim Kring added another

character without any legal clearance to "Heroes" named Usutu, a African artist that could paint the future, a character even closer to petitioners character Idai Markus. This is willful infringement by the respondent. (See Petition for Writ - Appendix O 56a - http://blog,the-eg,com/2007/12/04/tim-kring/and Support Material for Oral Argument, Volume I [section E - interview titled: TIM KRING - HEROES], [USUTU - from Heroes Wiki] received Jun 10, 2009 GRANTED Jun 16, 2009 - on Record in the Appeals Court appearing at Petition for Rehearing En Banc).

The Court of Appeals Decision. Under Fed. Rules Civ. Proc. Rule 56, at the Summary Judgement stage, the Judge's function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. The Judge must ask, NOT whether the evidence unmistakenly favors one side or the other but whether A FAIR MINDED JURY could return a verdict for the petitioners on the evidence presented.

The emergency injunction in question where Marcia Paul fails to inform the Supreme Court about a website owned by a "NBCU MARKET AFFILIATE" named Jason Hill a/k/a. "Rubixcubeman" who is in a legal agreement with NBCU through "Linkshare" to generate sales and viewers for "ShopNBC" and all "Heroes" products using the petitioners name and likeness from a NY Daily News newspaper article without permission or legal clearance. The mission of the website is to show the public that there is a "Real Living Artist that can paint the future named Enjai Eele a/k/a. Idai Markus" like the drug addicted character Issac Mendez on NBC TV show Heroes. This website is defamation to the petitioners personal

character and copyrighted IP because both petitioners DO NOT do drugs. This site: http://www.therealheroes.blogspot.com/2006/10/mission-5-see-connections.html was on the internet BEFORE the petitioners filed any lawsuit against NBCU and was never cleared by NBCU EMPLOYEE HARRISON WILCOX, appear at APPENDIX G (See Support Material for Oral Argument, Volume II [section F & G - Petition for Emergency Injunction - received Jun 15, 2009) on record in the Appeals Court appearing at Petition for Rehearing En Banc).

The Mischaracterization of the Facts and Record. Noted, NBCU did concede "access" solely for the purposes of its motion to dismiss as stated by Marcia Paul. Why concede to "access" if its not true?

The respondents motion should be based on truth, not on mis-representation of events or facts with no legal clearance. The Appeals Court in turn only repeated what was in the respondents motion. (See Petition for Writ - Appendix N, 54a - Oral argument page 13). The Respondent Tim Kring stated in interviews his usage of artwork in the pilot script as a sales device to pitch "Heroes" to NBC network. The artist that paints the future is the only character in respondent's work illustrated in his pilot script. (See NBC Heroes pilot script illustration at Petition for Writ - Appendix H) Interview appear at APPENDIX D On-1: Talking with "Heroes" Creator Tim Kring - Comic Book Resources http://www.comicbookresources.com/?page=article&id=8146.

The face to face settlement meeting was held on May 17, 2007, NOT MAY 7, 2007 as stated incorrectly

in Marcia Paul's "Brief In Opposition", (See Marcia Paul Description of Services) appear at APPENDIX H.

Marcia Paul after reviewing access material and hearing oral comparison presented by attorney Robert Wolf of Gerston Savage LLP, requested to speak to the petitioners directly and made a verbal offer of a Nuisance Insurance settlement of $750,000.00 and 5% net royalty. (Nuisance Insurance offers are a common practice in the film & TV industry to acquire product content unlawfully at low to no cost).

Marcia Paul's second offer was sent to John Coleman (counsel to petitioners) asking if they (the petitioners) WOULD DROP THE LAWSUIT AND WOULD NOT file for an appeal, in return, Marcia Paul would waive the $100,000.00 attorney fees against the petitioners. (WHY MAKE AN OFFER OF ANY KIND AFTER NBCU HAS WON IN THE DISTRICT COURT IF THERE IS NO MERIT IN PETITIONERS CLAIM?) (See Petition for Writ - Appendix L. - E-mail From John Coleman to Marcia Paul).

The Reason for Granting this petition:

As mentioned in the Petition For Writ the court reverse and remanded the case (*Fox v. MCA Inc.*,) for trial. In the case of *Bridgeport Music, Inc., and Southfield Music, Inc. v. UMG Recordings, Inc., and Universal Music Investments, Inc.*, No. 07-5596 (6th Cir. Nov. 4, 2009), a jury found UMG Recordings Inc., and Universal Music Group Inc., to have willfully infringed Bridgeport's rights in "Atomic Dog", notifying them that elements of "Atomic Dog" were used in a recording without permission. UMG filed a motion for

summary judgement claiming that the allegedly infringing elements in "D.O.G. in Me", the use of the word "dog" "were not copyrightable as a matter of law." The district court denied UMG's motion, and the matter proceeded to trial.

In this case (*Mallery v. NBC*) the respondent argued that "the elements infringed were "mere ideas," "scenes a faire", "unprotected elements", not copyrightable as a matter of law, that are free for the taking (Fair Use)." Those infringed elements were main storylines and at the core of the respondent work. In such situations, "TO CONSTITUTE INFRINGEMENT, A SINGLE LINE TAKEN FROM A PROTECTED WORK, AN INTREGRAL PART" OF THAT WORK" not "merely an incidental part of the background" and "READILY RECOGNIZABLE." Copying of a "QUALITATIVELY IMPORTANT AND CRUCIAL ELEMENT" "A SINGLE BRIEF PHRASE SO IDIOSYNCRATIC AS TO PRECLUDE COINCIDENCE might suffice to show substantial similarity and copying. The district court utilized the "fragmented literal similarity" standard. The petitioners storyline of an artist who can paint the future on canvas before it happens, is a UNIQUE, ORIGINAL, FULLY DEVELOPED COPYRIGHTED EXPRESSION that's an "INTREGRAL PART" OF THE PETITIONERS WORK and READILY RECOGNIZABLE." This is NO MERE INCIDENT that the same main and important character storyline from the petitioners work with 23 other fragmented similarities and paraphrases appear in the respondents work "Heroes without any legal clearance done".

The District Court and U.S. Court of Appeal committed an error in affirming the respondents argument that these expressions were random, few and isolated unprotectable scene a faire free for the taking. "Fair use".

The doctrine of fair use constitutes an affirmative defense that may be raised when there is substantial similarity between two works and evidence of copying. In determining applicability of the doctrine of fair use, courts consider statutory factors, and were all those factors met? The Supreme Court has held that these statutory factors must be considered "in light of the purposes of copyright" *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994).

CONCLUSION

For all the foregoing reasons, petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

Clifton Mallery A/K/A Enjai Omaa Eele
Amnau Karam Eele
P.O. Box 20474
N.Y., N.Y. 10011
Tele: 212-330-7137
e-mail: eeletwins10102002@yahoo.com

Dated April 14, 2010

APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix A: Appendix A -- The side by side comparison of Character and storyline. 1a

Appendix B: Appendix B -- Statement by Joann Vara, Emily Milias and Pierce Law Group LLP - legal clearance standards upheld by Copyright law, NBC and TV and Film industry 4a

Appendix C: Appendix C -- (See Interview: Harrison Wilcox - lotsofinterviews - http://www.lotsofinterviews.com/#/interviewharrison-wilcox/4531985068) - Clearance Exhibit - USUTU character . . 18a

Appendix D: Appendix D -- Use of artwork in script - interview by Tim Kring - 1-On-1: Talking with "Heroes" Creator Tim Kring - Comic Book Resources http://www.comicbookresources.com/?page=article&id=8146 - Russell Simmons "One World "magazine article titled: "Twin Hope" (Fold-Out Exhibit) 26a

Appendix E: Appendix E -- Copyrights for The Twins; Journey of the Soul ("Journey") copyrighted June 1, 2001 - registered April 13, 2007 and a short film excerpt from the "Journey" entitled: The Letter. copyrighted April 4, 2004 - registered September 20, 2006. (Fold-Out Exhibit) 30a

Appendix F: Appendix F -- NBC legal document dated Oct 23, 2006 (Tim Kring as original creator) 31a

Appendix G: Appendix G -- NBCU MARKET AFFILIATE - Jason Hill a/k/a "RUBIXCUBEMAN" - as A NBCU Linkshare Affiliate - Make Money Online at NBCU online at msnbc.com as a Market Affiliate. 33a

Appendix H: Appendix H -- See Marcia Paul Description of Services - face to face settlement meeting held on May 17, 2007, NOT May 7, 2007. . . . . 45a

APPENDIX A

MALLERY vs NBC - SIDE BY SIDE CHARACTER AND STORYLINE COMPARISON

A careful comparison discloses the petitioners work and the respondents work are the only two in the history of the Comic Book Genre, TV and Film Industry to have the same storyline of a artist who can paint the future on canvas before it happens, that lives in New York City and painted a catastrophe of two NYC landmark buildings before it happens on a large canvas, a bus exploding before it happens and validated the events with newspaper clippings, attempted to stop these events with the help of other supporting character storylines and 23 additional fragmented similarities or paraphrases. This is not a common expression that is a reoccurring scene a faire. This is a unique fully developed express character and storyline exclusive to its originator, the petitioners and deserve full protection under copyright law.

IDAI MARKUS: Ordinary person with extra-ordinary abilities - can paint the future before it happens on canvas - use newspaper clippings to validate prediction - painted a catastrophe of two landmark buildings - can make enemies bleed from their eyes with their minds - can transcend time and space - dress like identical twins - search for special object at museum in NYC - travel to NYC to stop a depicted catastrophe in NYC - can walk through walls

(NBC) ISSAC MENDEZ: Ordinary person with extra-ordinary abilities - can paint the future before it happens on canvas - use newspaper clippings to validate prediction - painted a catastrophe of two landmark buildings.

(NBC) USUTU & PETER PETRELLI: Ordinary person with extra-ordinary abilities - can paint the future before it happens on canvas.

(NBC) HIRO NAKAMURA & ANDO MASAKASHI: dress like identical twins - can transcend time and space - search for special object at museum in NYC - travel to NYC to stop a depicted catastrophe in NYC

(NBC) MAYA HERRERA & ALEJANDRO HERRERA: can make enemies bleed from their eyes with their minds

OLAGAIA ATUNE: can erase memory - wear a necklace with strange symbols - use unusual killing method of opening the skull - search for special object at museum in NYC

(NBC) SYLAR GABRIEL: can erase memory - wear a necklace with strange symbols - use unusual killing method of opening the skull

PROFESSOR HEINMAN: research genetics and human genome - search for ordinary people with extra-ordinary abilities

(NBC) MOHINDER & CHANDRA SURESH, DR. ZIMMERMAN: research genetics and human genome - search for ordinary people with extra-ordinary abilities

THE "EUROPEAN": art collector - research genome - search for ordinary people with extra-ordinary abilities

(NBC) DANIEL LINDERMAN & SIMONE DEVEAUX: art collector

"SERVITOR" TI-QUI: can walk through walls

(NBC) D L HAWKINS: can walk through walls

MADAME DACHETTE: reads minds

(NBC) MATT PARKMAN: reads minds

THE USE OF SYMBOLS TO SIGNIFY PLOTS

THE USE OF ECLIPSE AS LOGO AND TO SIGNIFY PLOT EVENTS

THE PAINTING DEPICTED A CATASTROPHE OF TWO LANDMARK BUILDINGS IN NYC

IMAGES AND ITEMS TO SIGNIFY A PLOT EVENT FOR LOCATING PEOPLE WITH EXTRA-ORDINARY ABILITIES

APPENDIX B

From: JoAnn Vara
Art Director

* * *

As a former employee of NBC who's job was clearance for NBC it is outrageous to see the plaintiffs have to answer questions in a free lecture they are giving to young students if they need to shoot heroin to paint the future like the artist on Heroes. That encapsulates the whole point of why clearance is crucial and why there are laws, systems and protocol in place to uphold copyright laws. That is why NBCU has a full time script clearance coordinator on Heroes.

There is a website called I.M.D.B. or Internet Movie Data Base. It lists cast and crew information such as the roles the crew played on a production and the episodes they worked on.
There is a man by the name of Harrison Wilcox.
He is listed as a script clearance coordinator / production assistant for Heroes from 2006-2009.

Script clearance research involves breaking a script down and identifying all items that represent possible legal problems which include: real people in the public that are living examples of the fictional character, character names, business names, products, organization names, locations, artwork, music, and copyrighted or trademarked material to list a few.

There are many clearance houses that specialize in this type of research and they do this type of clearance world wide.
Clearance should especially be done if the story is taking place in an actual location such as New York City which is the same location as the fictional story to make sure there isn't a real person with the similar characteristics and attributes doing the same thing as the fictional character.

Why hasn't Marcia Paul or anyone from NBCU put forth the clearance paperwork for the artist that can paint the future?

If these systems are in place and NBCU is employing someone full time to do the above script specific clearance, where is the clearance paperwork for the pilot?

Marcia Paul is well aware of what the copyright law is and how to protect one's copyright. Why hasn't she furnished the courts with this paperwork? NBCU according to Harrison Wilcox has a separate standards report. He (as the script clearance coordinator) meets with a lawyer for the show and the writers to go over the script. If there is anything that may be an issue, it is changed. So what happened in the plaintiff's case? Where is there clearance permission to use the artist that can paint the future?

This is absolutely stunning and unheard of. The plaintiffs have spent four years fighting for their original copyrighted materials which was used without their permission or consent, defamed and they were slapped with legal fees. NBC knew the protocol and

they ignored it when it came to the Plaintiffs and their original copyrighted IP.

The law is there for NBCU, but not for the creative original talent who had a copyright well before Heroes even existed. What is the copyright law for? Protecting big companies when they want to steal from original talent?

Where is the justice for the plaintiffs?
NBCU put "standards" in place for "their" products, but are completely negligent when it comes to respecting other people's copyrighted IP.

Tim Kring stole the plaintiffs work and Marcia Paul willingly manipulated the law to protect Tim Kring and NBC's stealing.

I have just read NBC's lawyer Marcia Paul's opposition to the Plaintiffs Supreme Court Cert.

Factual Background: NBCU Lawyer Marcia Paul states: "Petitioners are a husband and wife team who claim to have supernatural powers including painting and writing about events prior to their occurrence". "Petitioners claim to have predicted September 11th, 2001 attack on the World Trade Center.

The Male Plaintiff is a fine artist that can paint the future on canvas. Isaac Mendez is a fine artist that can paint the future on canvas.

The Plaintiffs' predicted September 11th 2001 attack on the World Trade Center. In a fine art painting on canvas of Two New York City landmark buildings.

Isaac Mendez predicted an attack on two New York City landmark buildings in his fine art paintings on canvas. He also takes newspaper clippings to show when the prediction came true.

The Plaintiff's predicted a bus blowing up.
Isaac Mendez predicted a bus blowing up.

The premise of Heroes is "ordinary people with extraordinary abilities" The Plaintiffs are real life "ordinary people" with "extraordinary abilities" and the Plaintiff's fictional character Idai Marcus is an "ordinary person" with "extraordinary abilities".

The Plaintiffs' Novel and paintings are copyrighted and came years before Heroes.

Question: Clearances are done on everything from products to music and characters with any similarities. Where is there clearance here? How can it be possible to do a side by side comparison with this many similarities if Heroes is truly original? Why are there so many overlapping themes between the two works?

The Decisions Below:
"The district court found that the works at issue are not substantially similar because "nearly every instance of alleged similarity between Heroes and the plaintiffs' work relates to unprotectable ideas rather than protectable expression". " The court reached this result through a careful analysis and comparison of the parties"

Question: what is protectable under the copyright law? The combination of ideas is an expression. Why are there two male artists that can paint the future on

canvas when the real life Plaintiff's work is copyrighted? Why is it unprotectable? Why is it a scene a faire, when on the NBC/Universal production I worked on, if there was someone living with the same characteristics as the fictional character and it didn't pass clearance, it had to be rewritten? Why is clearance upheld on every other production I have worked on, but not in this case?

How can you be "complex and original" (Plaintiffs' work) and have at least 12 substantial similarities (Heroes) that Marcia Paul referenced and not be infringing on the original copyrighted work? How is the artist that can paint the future an unprotectable expression if it has never been done before the original copyrighted works by the Plaintiffs?

Concept: Ordinary people with extraordinary abilities
Character: A male artist that can paint the future on canvas
Plot/Sequence: The artist using their art to stop a catastrophe to two N.Y. landmark buildings. And using newspaper clippings to validate the prophecy.
Pace: Both works jump from place to place and between characters and lead to the similar conclusion of trying to stop a catastrophe.

There was also a character never mentioned named Usutu on Heroes who is an African man who can paint the future. This character is even closer to the Plaintiffs, but he is never acknowledged or discussed.

What about the defamation of character to the Plaintiffs?
An African American artist who can paint the future in real life who doesn't have to shoot up drugs to paint

the future and who lectures for free to children about the ability.
Then there is a person in fiction who has the same abilities, is a Latino man and needs to shoot up drugs in order to paint the future.

This is truly unheard of in production. I do not understand how this could take place having worked for NBC/Universal and knowing what the industry standard is for clearances on their projects. Knowing that peoples' whole career and lively hood are on the line if they don't get it right on set. How did this show manage to break so many of the clearance guidelines and get away with it?

Marcia Paul and all who are involved who continued this injustice for four years should be made an example of.
This is criminal and all the parties involved should be brought to justice swiftly for their complete disregard and manipulation of the law.'

As a former employee of NBC and whose job was clearance for NBC I have a question to Marcia Paul and NBC: Where were the two words ever mentioned "Legal Clearance" in any of their side of the case in the entire four years of this lawsuit? This could have been easily cleared up with the proper clearance paperwork on the part of NBCU, their clearance house, their in house lawyer on the set of Heroes, and the script clearance coordinator Harrison Wilcox.
The petitioners civil rights and copyrights have been seriously violated by NBCU for the last four years. This injustice is beyond anything I have ever seen in my professional experience.

In my opinion, the show Heroes has infringed on many of the copyrights of the Plaintiffs and the legal representation for NBC/Universal is absolutely reckless.
I see total malpractice on the part of Marcia Paul and believe her actions are criminal. It is my belief that if the "shoe was on the other foot" NBC would be swift in claiming their work and prosecuting the people who infringed on them to the fullest extent of the law. The same swiftness should apply to the Plaintiffs'. Their work is found by the courts as original, and fully developed. Their work has been copyrighted and should be fully protected by the laws and the systems in place by the entertainment industry. There were checks and balances that were never done on the part of NBC/Universal.

This situation is alarming to me in many ways. I am concerned and afraid for the status of my job if there are projects that would allow such infringement to take place. This is a huge problem for me and people who are directly responsible for clearances in productions if regulations are not being upheld to industry standards and guidelines. This would completely change my job description and as it stands now, no new doctrines have been put in place. Clearance Domain takes itself very seriously and the production houses still rely heavily on their expertise in order to get the proper insurance for their productions.
There is no protection for creative talent when a corporation can infringe in such a devastating way and use the law to cover their stealing. The enclosed article from radar will demonstrate why NBC is trying to use the Plaintiff's lawsuit to set a precedent that would give NBC the power to get around these clearance

issues which NBC feels would cut into their profit margin. If NBC wins this lawsuit, my job is in jeopardy there will be no need for clearance houses or clearance employees such as myself because NBC will then have the power to use any artists or talents' IP in any way they choose to and have the legal loopholes to cover their tracks. This would be devastating to all of the young people in TV who depend on their jobs. What is so disturbing to me is, that the same time NBC is in a court of law taking the Plaintiff's copyrighted IP without any proof of clearance or permission, I was working for NBC on one of their projects and being severely drilled under the pressure of being fired constantly if I did not follow through with the clearance procedures.

I am shocked and I plan on taking this to my union for a round table discussion to alert others in the profession to this matter. There is hypocrisy here that is stunning. On a daily basis, I have to have approval for everything that is seen on camera. The legal team has to sign off on everything, and to see such infringement happening in this case is purely criminal.

/s/ Joann Vara

http://www.clearancedomain.com/newsletter/newsletter.htm

Executive Profile

Emily Milias – Radar Pictures, Inc.

What is your position at Radar?

Director, Legal and Business Affairs. My duties include overseeing clearances for our productions.

Everyone knows how important clearances are to studios because they are "deep pockets", but how important do you think clearances are deemed to be by your productions?

Even though we are an independent production company, we have the same "deep pockets" as the studios – the E&O insurance carriers.

From our "legal" perspective, clearances are critical. For example, a distributor will not accept a picture for delivery without documentation showing that production has obtained all necessary clearances, and that each person or entity providing such clearance has waived their right to obtain equitable and/or injunctive relief. Without this, a single clearance could feasibly prevent a multi-million dollar movie from being distributed.

From the production perspective, extreme time pressures as well as the various creative preferences of department heads and directors means that obtaining all necessary clearances may not be taken seriously. To avoid this, precise procedures to be followed by all

departments should be issued by the production attorney at the outset of pre-production, and open lines of communication between the clearance service and the various departments must be established and maintained throughout photography. We try to emphasize to every production how essential it is to run everything through the clearance process.

What is the biggest or toughest clearance issue you have ever dealt with on a production?

Trying to clear the items most wanted creatively by the director/producers is perhaps the biggest issue during a production. Unfortunately, some copyright holders won't allow their item to be used in a particular production for various reasons or will request very high clearance fees, or a particular character or place name won't clear through the research process. When the business/legal affairs department is unable to sign off on a requested clearance, it is always a disappointment to not be able to provide production with their first creative choices.

A recent industry-wide increase in insurance rates and deductibles is due to an increase in claims and settlements. This affects budgets and puts even a further emphasis on clearances. Can you comment on why you think this is happening?

Many insurance companies are increasingly unwilling to underwrite errors and omissions insurance policies for productions (or will only do so for substantially increased premium payments); according to insurance brokers, the risks in this particular market are simply to great. Of course, this means that a thorough

research process as well as signed clearance agreements for every item seen in a picture becomes even more important. As part of the application process for errors and omissions coverage, insurers require an actionable representation and warranty on the part of the producer that all necessary clearances have or will be obtained.

A lot of Art Departments complain about the clearance process. What is your opinion regarding the process and the state of clearances in the motion picture industry?

If a clear set of guidelines and clearance forms are issued to all department heads early during pre-production, then the clearance process should run smoothly. Difficulties arise when the copyright holders don't respond with the urgency necessary to keep up with the immediate demands of a production.

How has Clearance Domain helped you with your clearance needs?

Having a "one-stop shopping" outfit for script breakdowns, research, clearances and product placement, and review of dailies has helped to reduce our production clearance costs and greatly improved efficiency for both the production as well as our legal department. Additionally, having an established relationship with Clearance Domain means that they understand our internal policies and procedures, making for a smooth transition into each new production.

Client Spotlight

* * *

PIERCE LAW GROUP LLP
9100 Wilshire Boulevard
Suite 225, East Tower
Beverly Hills, California
90212-3415
Telephone: (310) 274-9191 Facsimile: (310) 274-9151

Clearance Procedures Guidelines

by David Albert Pierce, Esq.

Clearance for a motion picture production requires a thorough evaluation of the screenplay, the film footage, all contracts, set dressing, wardrobe, and more. The following list of clearance procedures should be followed prior to final cut or first exhibition of a motion picture. This list should not be considered exhaustive as it may not cover all situations which may arise since every production presents its own unique issues. Filmmakers and attorneys should always review the following points carefully with one another and work together to continually monitor the production at all stages to make certain that the motion picture contains no material which could give rise to a claim. There are three main reasons why the producer must be aware of clearance issues: avoidance of liability, eligibility for E&O insurance coverage, and assurance that the film will satisfy the distributors' legal delivery requirements.

1. Pre-Production Review For Possible Actionable Script Content: Prior to the start of production, the screenplay should be read for the purposes of identifying and eliminating material that is defamatory, violates rights of privacy and publicity, or is otherwise potentially actionable.

2. Obtain A Clearance Report: A Clearance Report of the final shooting script should be obtained by a professional clearance research company. These companies perform a variety of tasks, such as, researching all story character names and places against the commonality of the names, street addresses, and business names in the general population. This will help the producer avoid possible invasion of privacy and similar type claims from people whom the film may have unwittingly portrayed. The clearance report will also identify the proper contact from which to obtain product placement clearances for any products, copyrights, or trademarks that are referenced in the screenplay.

3. Document Origins Of "Original" Unpublished Works: If the screenplay is an unpublished original, the producer should inquire into and document the origins of the work, such as the stimulus for the creation of the basic idea, sequence of events, and characters.

* * *

APPENDIX C

Interview:Harrison Wilcox - lotsofinterviews
http://lotsofinterviews.com/#/interviewharrison-wilcox/4531985068 4/2/10 8:41PM

LotsofInterviews.com
The Home of Online Interviews

Interview:Harrison Wilcox

On the 27th of November 2008 LotsofInterviews conducted a interview with Harrison Wilcox who works as a Script Clearance Coordinator on Heroes and has also written some of the graphic novels released onto the internet. LotsofInterviews.com would like to thank mr Wilcox for his time. Hope you enjoy!

Can you tell me a bit about your two different roles on Heroes? :

Script Clearance Coordinator?
Is Script Clearance checking that the script is up to NBC standards? Is it in script clearance that things like bad e.g. racist or political jokes might be taken out?

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Script Clearance deals more with the legal permissions and protections of the show. Every script written gets sent to a research company. That company does a full report on the script and sends that information back to us. Stuff like names of characters in relation to real people, or how long it would really take Peter to fall eight stories off a building. Using that report I work with the writers and our lawyer, Safronia Johnson, to make sure there is nothing in the scripts that shouldn't be there. I also work with Art Department, Props, Set Dec, Wardrobe, and Post, to make sure we have permission to use everything that goes on camera. If we don't have permission, I try to get it. If we can't get permission, I usually come up with fictional names for things. Costa Verde and Copy Kingdom are examples of this. That's basically what I do. NBC Standards do their own reports which everyone on the show makes sure to follow.

* * *

MEMORANDUM

"EXAMPLE OF HOW NBCU DOES LEGAL CLEARANCE ON A LIVING PERSON THAT FITS THE DESCRIPTION OF A CHARACTER ON ALL NBCU'S TV SHOWS OR FILMS"

To: Bobby Cohen
Kerry Orent
Karla Nappi
Art Department
Locations Department

From: Christina Angeloudes and Lucy Wainwright (NBC Universal)

CC: Michelle Wright
Ann Lynch
Sheeraz Shah
Stephanie Weier
Wendy Cohen
Pat Murphy

Date: 17 September 2006

Re: "Definitely Maybe" – Legal Issues & Clearances

Dear All

We thought it prudent to set out a few legal issues in a memo so that everyone is clear on the position going forward

Hampton Role

By way of due diligence, we are going to ask Stephanie Weier to do a little research to establish whether any prominent faculty member of Columbia University Graduate School of Journalism fits Hampton's description (i.e. ageing alcoholic lothario).

Marshall Plumb

Any scene/script changes should be sent by the production to Marshall Plumb for clearance, all reports should be sent to both Lucy and Christina for review and approval before being used by any of the departments. The turnaround can be quick unless there is a legal issue but we always try and resolve matters as speedily as possible.

Any fictional names/companies/products/telephone numbers/number plates should be researched by Marshall Plumb or Clearance Domain and the review of such reports should be the same as above.

Stephanie Weier is currently researching the use of the name Maya Hayes urgently and we will update you as soon as we possibly can.

Usuto - Hereos Wiki

Usutu

From Heroes Wiki

Usutu was a wandering shaman in the desert sands of Africa. He was an evolved human with the ability to paint the future, ...

Contents

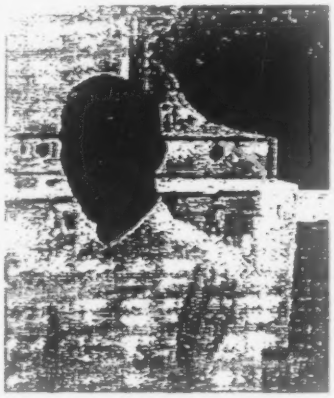
- 1 Character History
  - 1.1 The Butterfly Effect
  - 1.2 One of Us, One of Them
  - 1.3 I Am Become Death
  - 1.4 Dying of the Light
  - 1.5 Eris Quod Sum
  - 1.6 Villains
  - 1.7 It's Coming

* * *

- 2 Heroes Evolutions
- 3 Equipment
- 4 Evolved Human Ability
- 5 Memorable Quotes
- 6 Trivia
- 7 Fan Theories

Usutu
Portrayed by Ntare Guma Mbaho Mwine **First appearance** *The Butterfly Effect*
In-story stats
Known ability Precognition * * * **Gender** ♂ * * * **Date of death** 2007 **Home** Botswana **Residence** A handmade hut * * *

CONTINUED INFRINGEMENT AGAINST PLAINTIFFS



PLAINTIFF ENJAI EELE a/k/a IDAI MARKUS "THE ARTIST THAT CAN PAINT THE FUTURE" c/2005

Character History

The Butterfly Effect

Matt is teleported to the continent Africa. After a day in the hot sun he collapses, only to be found by Usutu. He helps Matt get back on his feet and gives him some water. He tells Matt he is in Africa, though he is not supposed to be here. As the two take a "spirit walk" back to Usutu's home, Matt asks to use Usutu's cell phone. Usutu replies that his phone is not getting service in this remote area, . . . The two continue walking.

One of Us, One of Them

Matt and Usutu continue "spirit walking" throughout the African desert. Matt asks Usutu how he knew his name, and Usutu replies by saying that he read Parkman's police badge. Usutu then shows Matt a painting on the ground depicting Matt and Molly Walker on the day that Matt rescued Molly from the Walkers' home. He says that when he was a boy, he was compelled to gather berries of many colors and paint. He says he painted this painting when he was a boy, and that he is no longer a boy. Matt then sees a large cliff face, covered with Usutu's prophetic paintings.

Usutu then brings Matt to his desert dwelling outside the cliff face. Matt sees a painting of him and a blonde woman carrying a baby, but Usutu says that the future has changed, and proceeds to cover the painting with a new coat of white paint. Matt asks Usutu what his future is, but Usutu doesn't respond and just

paints on the newly cleaned rock. Annoyed, Matt grabs Usutu and turns him around, but his

* * *

Evolved Human Ability

Usutu had the ability of precognition, which allows him to perceive information about future places or events before they happen. He knew who Matt was from his visions of the future, and stated that his presence in Africa meant that the future he saw had been changed. Like Isaac Mendez, he typically records what he sees in his visions in paintings.

Usutu was known to have developed this ability when he was relatively young, making him an experienced precog. He seems to be able to extend his ability to other people who share his ritual food and other paraphernalia.

* * *

Trivia

- In an interview, Ntare Guma Mbaho Mwine said that Tim Kring originally conceived of Usutu to be an archetype of "Yoda" from *Star Wars*. In fact, early scripts had Usutu speaking in broken English akin to the way Yoda speaks.

* * *

APPENDIX D

http://www.comicbookresources.com/?page=article&id=8022

Jim Lee, Michael Turner & More on "Heroes" Online Comic

by Jonah Weiland, Executive Producer | More from this Author |**FEED**

Wed, September 6th, 2006 at 12:00AM (PDT)

When the NBC television show "Heroes" makes its debut on September 25th, viewers will see a new take on the super hero genre, one which firmly plants an ensemble cast of characters with some sort of extra normal ability in the real world, albeit without the capes and spandex. The inclusion of Tim Sale and Jeph Loeb as part of the series certainly helps bring it closer to the comics industry, but "Heroes" itself is an entirely new creation from creator Tim Kring ("Crossing Jordan"). The show contains all new characters not based on any existing published characters, but that doesn't mean comics won't play a role.

* * *

For anyone who's followed Jeph Loeb's career in comics one can assume based on that preliminary list of artists that Loeb was a major force in getting these comics made, which Kring said certainly did help. "The truth of the matter is Tim Sale was brought onto the show before Jeph, although I got to Tim through Jeph because Jeph and I have been friends for many, many years," said Kring. "When I talked with Jeph about this early on - Jeph and I had several conversations while I was writing the pilot - I told him I wanted to include some artwork in the script as a sales device. Basically, I wanted to hire an artist out of my own pocket to do just a few pieces for the script. So, I asked Jeph to send me a couple of people and he got me in touch with Tim. That's how that started.

"So, whether it was Tim's involvement or Jeph's involvement, I don't know, but the show got a lot of buzz following Comic-Con International, so we were sort of on everybody's radar when we went and approached these people. Certainly Jeph's knowledge of the comics business and the people in it has been a huge help and you could couldn't ask for more."

But will these online comics see publication in the real world anytime soon? "I would certainly hope so and I'm hoping there aren't any legal issues in doing that, but my guess is - listen, I'm looking right now at color copies of these things and I just don't know why you wouldn't. They are spectacular."

"Heroes" debuts on NBC Monday, September 25th at 9:00 PM. Look for a longer interview with Kring, along with a review of the pilot and an interview with cast member Greg Gunberg in the weeks to come right here on CBR.

The respondent Tim Kring clearly states in this interview that the characters on the show like "the artist that can paint the future" has never been published before", which is a complete fabrication and violation of legal clearance by the respondent Tim Kring.

Appendix D and H clearly demonstrate that the petitioners original copyrighted intellectual property and characters like "the artist that can paint the future" have been published in several major publications worldwide years before "Heroes". Respondent Tim Kring later admitted in a media interview that "Heroes" is not the most original idea in the world, you build and borrow". NBCU attorney Marcia Paul stated in her "Brief in Opposition" that: "Petitioners also stated that the respondent Tim Kring admitted to using the "artist that can paint the future and artwork" in the pilot script as a "sale device" to pitch "Heroes" to NBC network" (petition p.17.), NBCU denies these allegations:"
The petitioners would like to state to the court that the respondents Tim Kring statement in Appendix D clearly states: "I wanted to include some art work in the "Heroes" script as a sales device". NBCU attorney Marcia Paul clearly fabricated the respondents Tim Kring statement about this material issue in her "Brief In Opposition" to The U.S. Supreme Court.

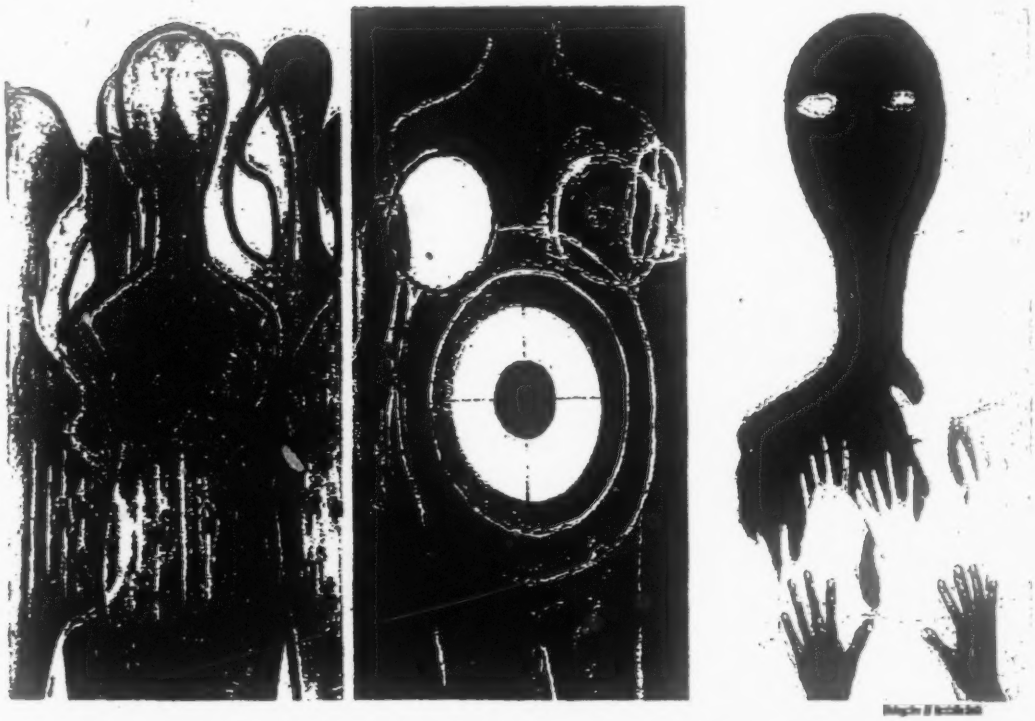
[See Fold-out Exhibit, next page]

Use of artwork in script - interview by Tim Kring - 1 -On-1 : Talking with "Heroes" Creator Tim Kring - Comic Book Resources http://www.comicbookresources .com/?page=article&id=8 146 - Russell Simmons "One World "magazine article titled: "Twin Hope"

twin hope

THE LOOP art

by [illegible]



THE HUSBAND-AND-WIFE TEAM OF EMIAH BIAA AND AMNAU EELE PAINT CANVASES WITH A MESSAGE.

FRESH ON THE SCENE FROM TEXAS, EMIAH BIAA EELE ([illegible]-EEL) simply goes by Eele. Divination, politics and family have become the thematic focus of their recent series, *Envious in America (Paradoxes in Black and White)—Urbanism 2001*. The work represents a state of emergency for Black America and traces the journey he and his wife, Amnau, have made from Texas across the United States around the world. Known as "The Twins," Eele and his wife are orally blessed with the gift of divination, as prophetic visions often appear in their dreams. Eele brings these images to life first through sketches and later as final pieces on canvas.

The couple, who once found themselves homeless due to their fight with the Florida State government, deliver a message of hope and restoration. That message is evidenced not only in Eele's art but in the creation of the Black Artist Association (BAA). BAA is dedicated to healing and educating young children—particularly those who are homeless or abused—through art, memory and divination. With the advent of Eele's *Envious in America* series, the Twins present their message of restoration not only for their own lives but the lives of an entire community.

Eele's southern dialect and upbringing provide a wealth of cultural references and Pan-Africanist views. His experiences as a child of the Civil Rights era and Black Power movement become vivid symbolism in his stark paintings, such as "It's Not My Business" and "Mother of the Target." In "Business," Eele tells the tale of repression and abuse endured by Black girls and women during slavery. His graphic oil on canvas depicts a stalk window frame accompanied by several box forms. These forms could easily stand as markers for the many lives of girls and women ravished in the night by their slave masters. The painting comes to life when you gaze closer at the scratches on the surface of the canvas. His memorial to these experiences prompts the viewer to acknowledge his/her role in the dark night of our tomorrows.

In "Mother of the Target," a dismembered female figure appears in the center of a gray muted canvas. The figure's left breast is painted white and its right breast is painted black. Her belly is outlined by repetitive white circles. In the center of her womb is a target, similar to that of a police one, that bleeds a cosmogram. Amnau revealed that the cosmogram represents access "into the living and the unseen world." Traditional Kongo-Atlantic religions view the cosmogram "as the point of intersection between the ancestors and the living." While peeling throught the multi-layers of Eele's "Mother of the Target" piece, one becomes a kind of participant in the work: one with a role, either as an assailant responsible for taking the life of a mother and unborn child or as an onlooker responsible for the lives lost while standing by.

Eele eloquently addresses our issues further in "General Population," one of the strongest pieces in the series. "Population" is a crisp, transparent painting of congregated, faceless mothers-to-be. It is painted as though it sat on an X-ray table that illuminated the prognosis of the full-bellied women and their children. The viewer immediately finds out that the future generation is one of incarcerated black babies. It is here that Eele's message of restoration is met with a clear consequential element. His bold visions, sketched in the dark, have begun to radiate light towards necessary communal awareness. Eele's *Envious in America* series urges its viewers to play an active part in the Black life cycle as stronger Black women, men and children.

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APPENDIX E

[See Fold-out Exhibit, next 2 pages]

Copyrights for The Twins; Journey of the Soul ("Journey") copyrighted June 1, 2001 - registered April 13, 2007 and a short film excerpt from the "Journey" entitled: The Letter, copyrighted April 4, 2004 - registered September 20, 2006.

Certificate of Registration

This Certificate issued under the seal of the Copyright Office in accordance with title 17, United States Code, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

Marybeth Peters

Register of Copyrights, United States of America

Form TX

For a Nondramatic Literary Work
UNITED STATES COPYRIGHT OFFICE

TX 6-538-876

EFFECTIVE DATE OF REGISTRATION

APR 13 2007

Month Day Year

DO NOT WRITE ABOVE THIS LINE. IF YOU NEED MORE SPACE, USE A SEPARATE CONTINUATION SHEET.

1 TITLE OF THIS WORK ▼

The Twins' Journey Of The Soul

PREVIOUS OR ALTERNATIVE TITLES ▼

PUBLICATION AS A CONTRIBUTION If this work was published as a contribution to a periodical, serial, or collection, give information about the collective work in which the contribution appeared. Title of Collective Work ▼

If published in a periodical or serial give: Volume ▼ Number ▼ Issue Date ▼ On Pages ▼

2 a NAME OF AUTHOR ▼

Amnah Karan A/K/A Amnah Karan Eele

DATES OF BIRTH AND DEATH
Year Born ▼ Year Died ▼
[redacted]-62

Was this contribution to the work a "work made for hire"?
☐ Yes
☒ No

AUTHOR'S NATIONALITY OR DOMICILE
Name of Country
OR { Citizen of ▶ USA
Domiciled in ▶ USA

WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK
Anonymous? ☐ Yes ☒ No
Pseudonymous? ☐ Yes ☒ No

If the answer to either of these questions is "Yes," see detailed instructions.

NATURE OF AUTHORSHIP Briefly describe nature of material created by this author in which copyright is claimed. ▼

Creator & Writer Of The Page Handwritten Book The Twins' Journey Of The Soul

NOTE

Under the law, the "author" of a "work made for hire" is generally the employer, not the employee (see instructions). For any part of this work that was "made for hire" check "Yes" in the space provided, give the employer (or other person for whom the work was prepared) as "Author" of that part, and leave the space for dates of birth and death blank.

b NAME OF AUTHOR ▼

Clifton J. Mallery A/K/A Enkai Dmaa Eele

DATES OF BIRTH AND DEATH
Year Born ▼ Year Died ▼
[redacted]-54

Was this contribution to the work a "work made for hire"?
☐ Yes
☒ No

AUTHOR'S NATIONALITY OR DOMICILE
Name of Country
OR { Citizen of ▶ USA
Domiciled in ▶ USA

WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK
Anonymous? ☐ Yes ☒ No
Pseudonymous? ☐ Yes ☒ No

If the answer to either of these questions is "Yes," see detailed instructions.

NATURE OF AUTHORSHIP Briefly describe nature of material created by this author in which copyright is claimed. ▼

Creator & Writer Of The Page Handwritten Book The Twins' Journey Of The Soul

c NAME OF AUTHOR ▼

DATES OF BIRTH AND DEATH
Year Born ▼ Year Died ▼

Was this contribution to the work a "work made for hire"?
☐ Yes
☐ No

AUTHOR'S NATIONALITY OR DOMICILE
Name of Country
OR { Citizen of ▶
Domiciled in ▶

WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK
Anonymous? ☐ Yes ☐ No
Pseudonymous? ☐ Yes ☐ No

If the answer to either of these questions is "Yes," see detailed instructions.

NATURE OF AUTHORSHIP Briefly describe nature of material created by this author in which copyright is claimed. ▼

3 a YEAR IN WHICH CREATION OF THIS WORK WAS COMPLETED This information must be given in all cases. 2006 Year ▶

b DATE AND NATION OF FIRST PUBLICATION OF THIS PARTICULAR WORK Complete this information ONLY if this work has been published. June 1 Day 2007 Year ▶

4 COPYRIGHT CLAIMANT(S) Name and address must be given even if the claimant is the same as the author given in space 2. ▼

Clifton J. Mallery And Amnah Karan
[redacted] N.J. NY [redacted]

TRANSFER If the claimant(s) named here in space 4 is (are) different from the author(s) named in space 2, give a brief statement of how the claimant(s) obtained ownership of the copyright. ▼

APPLICATION RECEIVED
APR 13 2007

ONE DEPOSIT RECEIVED
APR 13 2007

TWO DEPOSITS RECEIVED

FUNDS RECEIVED
$45.00

Certificate of Registration

This Certificate issued under the seal of the Copyright Office in accordance with title 17, United States Code, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

Marybeth Peters

Register of Copyrights, United States of America

Form PA
For a Work of Performing Arts
UNITED STATES COPYRIGHT OFFICE

PA 1-348-956

EFFECTIVE DATE OF REGISTRATION
9 20 2006
Month Day Year

DO NOT WRITE ABOVE THIS LINE. IF YOU NEED MORE SPACE, USE A SEPARATE CONTINUATION SHEET.

1 TITLE OF THIS WORK ▼

The Letter

PREVIOUS OR ALTERNATIVE TITLES ▼

NATURE OF THIS WORK ▼ See instructions

Short Film

2 NAME OF AUTHOR ▼

a Clifton J. Mallery a/k/a Enjai Omma Eele

DATES OF BIRTH AND DEATH
Year Born ▼ [redacted]-54 Year Died ▼

Was this contribution to the work a "work made for hire"?
☐ Yes ☑ No

AUTHOR'S NATIONALITY OR DOMICILE
Name of Country
OR Citizen of USA
Domiciled in USA

WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK
Anonymous? ☐ Yes ☑ No
Pseudonymous? ☐ Yes ☑ No
If the answer to either of these questions is "Yes," see detailed instructions.

NATURE OF AUTHORSHIP Briefly describe nature of material created by this author in which copyright is claimed. ▼
Creator, writer, and producer of the Letter a short subject film

NOTE
Under the law, the "author" of a "work made for hire" is generally the employer, not the employee (see instructions). For any part of this work that was "made for hire" check "Yes" in the space provided, give the employer (or other person for whom the work was prepared) as "Author" of that part, and leave the space for dates of birth and death blank.

NAME OF AUTHOR ▼

b Amman Karam a/k/a Amman Karam Eele

DATES OF BIRTH AND DEATH
Year Born ▼ [redacted]-62 Year Died ▼

Was this contribution to the work a "work made for hire"?
☐ Yes ☑ No

AUTHOR'S NATIONALITY OR DOMICILE
Name of Country
OR Citizen of USA
Domiciled in USA

WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK
Anonymous? ☐ Yes ☑ No
Pseudonymous? ☐ Yes ☑ No
If the answer to either of these questions is "Yes," see detailed instructions.

NATURE OF AUTHORSHIP Briefly describe nature of material created by this author in which copyright is claimed. ▼
Creator, writer, and producer of the Letter an short subject film

NAME OF AUTHOR ▼

c

DATES OF BIRTH AND DEATH
Year Born ▼ Year Died ▼

Was this contribution to the work a "work made for hire"?
☐ Yes ☐ No

AUTHOR'S NATIONALITY OR DOMICILE
Name of Country
OR Citizen of
Domiciled in

WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK
Anonymous? ☐ Yes ☐ No
Pseudonymous? ☐ Yes ☐ No
If the answer to either of these questions is "Yes," see detailed instructions.

NATURE OF AUTHORSHIP Briefly describe nature of material created by this author in which copyright is claimed. ▼

3 a YEAR IN WHICH CREATION OF THIS WORK WAS COMPLETED 2004 Year
This information must be given in all cases.

b DATE AND NATION OF FIRST PUBLICATION OF THIS PARTICULAR WORK
Complete this information ONLY if this work has been published.
Month April Day 4 Year 2004
Nation

4 COPYRIGHT CLAIMANT(S) Name and address must be given even if the claimant is the same as the author given in space 2. ▼

Clifton J. Mallery and Amman Karam
[redacted] New York, NY [redacted]

See instructions before completing this space.

TRANSFER If the claimant(s) named here in space 4 is (are) different from the author(s) named in space 2, give a brief statement of how the claimant(s) obtained ownership of the copyright. ▼

DO NOT WRITE HERE
OFFICE USE ONLY

APPLICATION RECEIVED
SEP 20 2006

ONE DEPOSIT RECEIVED
SEP 20 2006

TWO DEPOSITS RECEIVED

FUNDS RECEIVED

DRD/D

APPENDIX F

National Broadcasting
Company, Inc.
30 Rockefeller Plaza
New York, New York 10112
212 664-4966
212 790-4703 Fax
gillian.lusins@nbc.com

Gillian M. Lusins
Vice President
Intellectual
Property Counsel
Law Department

October 23, 2006

Via Fax and Mail
Robert E. Grener
1350 Broadway, Suite 1507
New York, New York 10018

Re: Heroes Claim

Dear Mr. Greener:

I write in response to your letter of October 6, 2006 regarding the NBC Studios, Inc. ("NBCS") television series "Heroes" ("Series"). Your letter claims that the character Isaac Menendez and the artwork produced by that character are based on your clients Enjai Eele and Amnau Eele. Our investigation indicates that, as is the case with the entire Series, the character of

Isaac Menendez is an entirety original creation of Tim Kring, the creator of this Series. Further, the artwork produced by Isaac Menendez is collaborative effort between Tim Kring and Tim Sale, the Eisner award winning comic artist.

For the foregoing reasons, NBCS believes that any claim brought on behalf of your client would be without merit. Nothing contained in or omitted from this letter shall be deemed an admission by NBCS of any facts or a waiver of any rights, remedies or defenses of NBCS in connection with the subject matter hereof, all of which are expressly reserved.

This letter should not be construed as a recitation of facts supporting additional claims that NUTS may have in this matter, and nothing contained herein in intended to, or does, constitute a waiver of any rights, remedy or position of NUTS, each and all of which are expressly reserved.

Sincerely,

/s/
Gillian M. Lusins

APPENDIX G

based on the NBC hit series. 11/13/2006 10:04 PM

THE REAL HEROES

THE MISSION - TO FIND REAL HEROES, LIKE THE PEOPLE ON THE NBC SHOW. YOU DON'T HAVE TO BE A SUPER HERO TO DO THIS. YOU JUST NEED A SUPER HERO STORY. LET'S SEE IF WE CAN FIND OUT THE TRUTH. THIS IS A HEROES FANSITE.

Google™

Google Heroes: Search

Welcome to my blog about the NBC Show Heroes, I'm trying to find real people with real Hero stories. The response so far has been great, in the first 7 days 1000+ visitors. Thank you for your support of this blog!

Any blog post that has links in it will never contain a misleading link. Any commercial offering will be clearly marked. Other links are intended to be informative, and thought provoking.

A way you can support this blog is by using the Google features. Please post comments in their apporiate categories. All comments are welcome, even negative ones (see HateMail).

The idea behind this website is to discover people in the real world that have powers. To bring to light mysteries and generally cool ideaologies. I think that everyone has to some degree experienced powers similar to the characters in the Heroes NBC show. I would like to write and read about just that.

The site is mission based, they will be updated as the shows progress. Even the original posts change to include more information. So check back with the blog often, I try to update it more than once a week. I've added a linkorama so you can promote your sites. You can read the latest mission below.... Good luck.

ABOUT ME
RUBIXCUBEMAN
EDMONTON ALBERTA CANADA
VIEW MY COMPLETE PROFILE

PREVIOUS POSTS

prophetic utterings 1

Mission 9: Find those who have exposed themselves....

Mission 8: Unexpected Endings: Seek those who have...

Mission 7 Find who can walk through walls

Heroes Never Ending LinkoRama

Blogspot Outages

Sub Mission: Heroes Merchandise

Mission 6: Find He Who Can Fly

Mission 5: See the Connections

Mission 4: Find those who have Defied Death.

Support this site! Link to my blog!

WHO ARE THIS HEROES CAST?

//therealheroes.blogspot.com/2006/10/mission-5-see-connections.html

Real Heroes Blog on blogspot.com; based on the NBC hit series. 11/1/32006 10:04 PM

Robert De Niro and his Tribeca Film Co. Business partner Jane Rosenthal are getting much more attention than they want from "The Twins," a brother-sister-act who say they're "44th-generation diviners" and claim they predicted the terrible events of 9/11 six months before they occurred.

Forty-one-year-old Amnau Eele, who claims to be able to see the future with her same-aged brother Enjai, told this column that, in March 2001, they delivered to Rosenthal's office a portfolio of "divination art," including a drawing that spelled out ringleader Mohammad Atta's name, as well as the date, time and precise nature of the attack on the World Trade Center.

The claims are repeated in "The Letter," a short film focusing on their close encounter with Tribeca Film.

"Ms. Rosenthal viewed the work, she found it interesting, and she sent the materials to (a development executive) at Tribeca Films," asserts their home movie. "Today, The Twins wonder what would Mr. De Niro say or think if he knew that information on Sept. 11, 2001, was in his office on March 26, 2001."

Rubixcubeman said...
THERE IS A REAL LIVING ARTIST WHO CAN PAINT THE FUTURE BEFORE IT HAPPENS LIVING IN NEW YORK CITY. HIS NAME IS EELE. I SAW HIM AT HUNTER COLLEGE NEW YORK CITY ON APRIL 22, 2005.

Rubixcubeman said...
WEIRD PREMONITION?

http://www.jewishworldreview.com/0804/grove080604.asp

HINTS THAT HEROES IDEA WAS STOLEN

http//blogs.nbcuni.com/heroes/2006/09/keeping_things_subtle.php

http://www.miriadz.com/blog/291/earn-money-selling-nbc-premier-merchandise-as-a-links...

Earn Money Selling NBC Premier Merchandise As A LinkShare Affiliate

Posted on May 7, 2006
Filed Under Affiliate Networks, Affiliate Programs, Web Site Promotion

If you're new here, join the community by subscribing to my RSS feed. | RSS Feeds via Email or Enter your name and email address to the form located at the top of each blog page for email updates. Glad to have your onboard!

ShopNBC: is excited to announce that our program has launched in the **Linkshare Network**!

NBCU attorney Marcia Paul states in her motion to dismiss in the 2nd circuit court that:

'Based on supposed newly-raised facts regarding the operation of a fan website that, on the face of the information plaintiffs supply about it, is not even owned or operated by NBC. The context of the blog entries suggest "RUBIXCUBEMAN" is a fan of the television show Heroes."

The petitioners would like to state to the court that this is a "total fabrication and mischaracterization" by NBCU attorney Marcia Paul., Appendix G will demonstrate that "RUBIXCUBEMAN" is in a contract with NBCU through "LINKSHARE" to sell all "SHOPNBC" and "HEROES" products on the internet

using the petitioners likeness and original copyrighted intellectual property as "real life artists that can paint the future" from a NY Daily News newspaper article titled: Future Tribeca Stars" written by Lloyd Grove dated August 5, 2004 with out any legal clearance done by NBCU employee Harrison Wilcox.

Intellectual Property Policy

Linkshare Corporation ("LinkShare") provides affiliate marketing networks and technology that permit independent website operators to form cooperative marketing relationships using the World Wide Web. Each LinkShare network is available for use only by persons or entities that form the network as either a "Merchant" or an "Affiliate." LinkShare may provide its members with the use of bulletin board services, chat areas, forums, electronic mail postings, email service or other message or communication facilities designed for communication with other members of the Network. LinkShare is the neutral host of each affiliate marketing network it administers, and members of each network are independent persons or entities that are not controlled by LinkShare. Neither the admission nor the continued membership of any person or entity as a Merchant or Affiliate constitutes endorsement by LinkShare. LinkShare does not police their actions, nor does LinkShare undertake any responsibility for their acts or omissions.

While LinkShare encourages Merchants and Affiliates who use any LinkShare network to adopt responsible approaches to online marketing, it is possible that some Merchants or Affiliates will take actions or engage in activities through the network or otherwise

that are alleged to infringe the intellectual property rights of others.

Claims of Copyright Infringement

Upon proper notification of claimed infringement, Linkshare's policy is to respond expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity. When Filing a notice of claimed infringement with us, for such notification to be effective under Title II of the Digital Millennium Copyright Act ("DMCA"), the notification must be in writing and provided to the designated agent listed below. In accordance with Section (3)(A) of the DMCA, the notification of claimed infringement ...

* * *

The full text of this statute can be found at the U.S. Copyright Office Web Site, http://lcWeb.loc.gov/copyright.

//www.linkshare.com/legal/intellectual_property/

http://www.msnbc.msn.com/id/30601292/

6 Easy Ways to Make Money Online - Entrepreneur.com - msnbc.com

Learn how affiliate marketing can skyrocket your bottom line.

By Jon Rognerud
Entrepreneur.com
updated 12:00 p.m. ET, Wed., May 6, 2009

A staggering $2.1 billion in affiliate marketing fees were paid to blog and website owners in 2008. This finding in a recent study by Jupiter Research confirms what many savvy Internet marketers have known for a while: Affiliate marketing has become one of the top business opportunities online because the startup costs are so low and the income you generate can be mind-blowing.

Affiliate marketing involves having your own site and sending your traffic to someone else's site to buy their products or services. For every sale initiated by a link from your site, you earn a percentage--an affiliate sales commission.

Affiliate marketing can be done on a part-time basis, and many are so successful that they've made it their full-time job. Equally exciting, you can get in the game in just a few hours. But how successful you are is based on the amount of time and effort you devote. Here are six tips to get you started:

1. Create a website or blog
To start as an affiliate marketer, you must have a site on which to place links to the products or services you recommend. There are many inexpensive website services such as Hostgator and GoDaddy. It's also easy to set up a free blog through services such as Google's Blogger blog network. I also use Namecheap for domains and Hostnine (get a reseller account) for hosting.

2. Decide your product/service niche
Affiliate marketers help companies and entrepreneurs sell everything from jewelry and cell phones to website services and how-to e-books. Choose an area you're familiar with or one you're enthusiastic about learning. You'll be more likely to do the work and less likely to get bored before the money starts rolling in.

3. Find products and services to promote
Many affiliate networks exist to connect merchants with affiliate site publishers who can help sell their goods. Companies such as:

- Clickbank, E-junkie and PayDotCom lead the pack in connecting the creators of e-books and software with affiliates to help sell their digital download products.
- Commission Junction is popular for those who want to sell more traditional wares ranging from travel services to janitorial franchises.
- Google AdSense, which doesn't require your involvement to result in a sale. Your income is realized on a pay-per-click basis, just for leading your traffic to click to a merchant's site. PPC affiliate programs pay a lot less than programs where your referral must result in a sale. Keep in

mind that a site peppered with ads and no authority or trust can look and feel like spam, and you won't get good results.

4. Affiliate site content

There are two main approaches or business models to choose from when setting up an affiliate marketing site:

- Resource Sites These sites are focused on offering lots of how-to articles and posts, and then provide affiliate links or banner ads to click for more details. Frequently adding fresh related content is vital because it gives people a reason to return to your site--and click some of your money-making links.
- Review Sites You've tried the products in your niche, now you write them up and rate them to help your site visitors decide what to buy. For each product you review, you provide a link or banner ad that clicks through for sales on your merchant partner's site. Less frequent content updates are necessary--just tweak your site about once a week to let the search engines know your site's still alive, and always try to build links.

5. Affiliate sites must attract lots of targeted traffic to succeed

Most people visiting your website or blog won't click your affiliate links. That's why it's crucial to employ a mix of marketing tactics to increase traffic--highly targeted traffic--to your site.

There are four main ways to get more site exposure and attract more potential customers:

* * *

APPENDIX II

LAWYERS

NBC Universal, Inc.
Invoice No. 5605620
Page No. 2

DATE	PROFESSIONAL	TIME	DESCRIPTION OF SERVICES
05/07/07	L. Koonce	0.50	Review of manuscript ("Journey")
05/07/07	M. Paul	2.50	Emails to and from Lackowitz, H. Lane, G. Lusins regarding manuscript and regarding meeting; interoffice conferences with L. Koonce; review manuscript; revise draft brief; research probative similarity

* * *

05/17/07	L. Koonce	3.20	Pre and Post conference meetings with client; settlement meeting with plaintiffs and plaintiff's lawyers; interoffice conferences with M. Paul regarding brief (revisions based on meetings); review emails regarding Kring creation; revisions to brief
05/17/07	M. Paul	2.50	Pre and Post conference meetings with client; settlement meeting with plaintiff and plaintiff's lawyers; interoffice conferences with L.Koonce

* * *

Supreme Court, U S
FILED
MAY 2 1 2010
OFFICE OF THE CLERK

No 09-999

In The
Supreme Court of the United States

CLIFTON MALLERY A/K/A ENJAI OMAA EELE,
AMNAU KARAM EELE,

Petitioners,

v

NBC UNIVERSAL, INC , NBC UNIVERSAL TELEVISION STUDIO, TAIL WIND PRODUCTIONS, TIM KRING, DENNIS HAMMER, ALLAN ARKUSH, JEPH LOEB, BRYAN FULLER,

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

THEODORE F SHIELLS
Counsel of Record
CARR LLP
900 JACKSON STREET NO 670
DALLAS, TEXAS 75202
(214) 760-3032
tshiells@Carrip com

Counsel for Petitioners Clifton Mallery a/k/a Enjai Omaa Eele, Amnau Karam Eele

May 21, 2010

QUESTION PRESENTED

Whether Fed R Civ P 56 and the Due Process Clause require that a nonmovant be given prior notice, in accordance with the notice requirements of Fed R Civ P 56(c), before a motion under Fed R Civ P 12(b)(6) is converted to one under Rule 56, or whether a trial judge may do so by converting the Rule 12(b)(6) to one under Rule 56 and simultaneously entering judgment, without providing prior notice, an issue upon which the Circuits are split

TABLE OF CONTENTS

Question Presented 1

Table of Contents ii

Table of Cited Authorities iii

Relevant Provisions Involved 1

Statement of the Case 1

1 The District Court Proceedings 2

2 The Second Circuit Court of Appeals Proceedings 4

Reasons for Granting the Petition 4

Conclusion 12

Certification of Counsel 14

TABLE OF CITED AUTHORITIES

Cases

Adams v Campbell County School District,
483 F 2d 1351 (10th Cir 1973) 7

Carter v Stanton,
405 U S 669, 92 S Ct 1232, 31 L Ed 2d 569
(1972), *vacated on other grounds* 5

Celotex Corp v Catrett,
477 U S 317, 106 S Ct 2548 (1986) 4, 8

Davis Elliott International, Inc v Pan American Container Corp,
705 F 2d 705(3d Cir 1983) 6

Estate of Smith v Tarrant County Hospital District,
691 F 2d 207, 208 (5th Cir 1982) 6

Finn v Gunter,
722 F 2d 711 (11th Cir 1984) 5

Garaux v Pulley,
739 F 2d 437 (9th Cir 1984) 8

Gay v Wall,
761 F 2d 175 (4th Cir 1985) 7

Griffith v Wainwright,
772 F 2d 822 (11th Cir 1985) 5

Herron v Beck,
693 F 2d 125 (11th Cir 1982) 5

Shelby County Health Care Corp v Southern Council of Indus Workers,
203 F 3d 926 (6th Cir 2000) 7

Sira v Morton,
380 F 3d 57 (2d Cir 2004) 3

Three Boys Music Corp v Bolton,
212 F 3d 477 (9th Cir 2000) 10

Underwood v Hunter,
604 F 2d 367 (5th Cir 1979) 6

Winfrey v Brewer,
570 F 2d 761 (8th Cir 1978) 6

Rules

Fed R Civ P 12(b)(6) *passim*
Fed R Civ P 56 *passim*
Fed R Civ P 56(c) *passim*
Fed R Civ P 56(f) 9, 10

Other Authorities

Statement by Tim Kring – NBC's "creator" of "Heroes," (posted on internet December 4, 2007), Appendix O to Petition for Certiorari (http //blog the-cg com/2007/12/04/tim-kring/) 9

RELEVANT PROVISIONS INVOLVED

Fed R Civ P 56 Summary Judgment

* * *

(c) SERVING THE MOTION, PROCEEDINGS The motion must be served at least 10 days before the day set for the hearing An opposing party may serve opposing affidavits before the hearing day The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law

STATEMENT OF THE CASE

Petitioners Clifton Mallery a/k/a Enjai Omaa Eele and Amnau Karam Eele respectfully seek rehearing of the order denying a writ of certiorari to resolve an important split in the Circuit Courts on an important issue of federal law that was not previously presented in Petitioners' Petition for Grant of a Writ of Certiorari That important issue is

Whether Fed R Civ P Rule 56 and the Due Process Clause require that a nonmovant be given prior notice, in accordance with the notice requirements of Fed R Civ P Rule 56(c), before a motion under Fed R Civ P Rule 12(b)(6) is converted to one under Rule 56, or whether a trial judge may do so by converting the Rule 12(b)(6) to one under Rule 56 and simultaneously entering judgment, without providing prior notice, an issue upon which the Circuits are split

As shown below, the Circuit Courts of Appeals are split on this important issue The majority of Circuits have a "bright line" rule mandating such prior notice in all cases (a rule submitted to be correct) Some Circuits (including the Second Circuit, which decided the appeal that is the subject of this petition for rehearing) hold that although such advance notice "should" be given, it need not be in all cases The resolution of this issue is controlling of the outcome of Petitioners' appeal of the grant of summary judgment against them, since such summary judgment was granted against them without the required notice Furthermore, because Rule 12(b)(6) motions are ubiquitous in federal practice, resolution of this split by the Court is of enormous practical importance to the entire federal bench and bar

1. The District Court Proceedings

On June 15, 2007, defendant NBC, in response to Petitioners' Complaint alleging claims for copyright infringement, in lieu of an answer, filed a motion to dismiss in the district court pursuant to Fed R Civ P 12(b)(6) NBC attached copies of the copyrighted works, some episodes of the accused "Heroes" television show to its motion, and also relied on an Affidavit of Koonce, which included a variety of exhibits allegedly showing "scenes a faire" In its motion, NBC admitted having access to the Petitioners' copyrighted works However, NBC argued that a comparison of the allegedly infringed and infringing works referenced in the complaint showed no substantial similarity of protectable expression

On August 2, 2007, Petitioners responded to the Rule 12(b)(6) motion, citing only cases pertinent to Rule 12(b)(6), and showing that substantial similarity did exist Petitioners also objected to NBC's presentation of the Koonce Affidavit and exhibits as being beyond the scope of a Rule 12(b)(6) motion On September 7, 2007, NBC served a Reply

On December 3, 2007, the district court issued its decision, simultaneously converting NBC's motion to dismiss under Rule 12(b)(6) into a motion for summary judgment under Rule 56 and granting summary judgment against Petitioners *Mallery v NBC Universal, Inc* , No 07 Civ 2250, 2207 WL 458196 (S D N Y Dec 3, 2007), *aff'd*, 331 Fed Appx 832 (2d Cir 2009) The district court provided no prior notice of such intended conversion However, the district court acknowledged in a footnote that "[a] district court must ordinarily give notice to the parties before converting a motion to dismiss to a motion for summary judgment," citing *Kopec v Coughlin*, 922 F 2d 152, 154-55 (2d Cir 1991) See *Mallery v NBC Universal, Inc* , No 07 Civ 2250, 2207 WL 458196 (S D N Y Dec 3, 2007), aff'd, 331 Fed Appx 832 (2d Cir 2009) Relying upon the Second Circuit holding in *Sira v Morton*, 380 F 3d 57, 68 (2d Cir 2004), the district court held that "[a] party is deemed to have notice that a motion may be converted if that party should reasonably have recognized the possibility that such a conversion would occur " (citation omitted) The district court determined that, "[g]iven the arguments raised by the parties (as well as the cases cited, which almost exclusively resolve such arguments on motions for summary judgment), the parties should have reasonably recognized that the instant motion could be converted to one for summary judgment " *Id*

2. The Second Circuit Court of Appeals Proceedings

On June 3, 2008, in a summary decision, the Second Circuit Court of Appeals affirmed *Mallery v NBC Universal, Inc* , 331 Fed Appx 821, 2009 WL 1532494 (2d Cir 2008)

REASONS FOR GRANTING THE PETITION

It is respectfully submitted that the Second Circuit's rule that notice "should" be given prior to conversion of a Rule 12(b)(6) motion to dismiss to a Rule 56 motion for summary judgment, but need not be in all cases, does not comport with the requirements of Rule 56(c) It is also respectfully submitted that decisions of this Court on a similar issue of notice relating to *sua sponte* Rule 56 motions, show that actual notice is *required*, not optional *See Celotex Corp v Catrett*, 477 U S 317, 326, 106 S Ct 2548, 2554 (1986) ("district courts are widely acknowledged to possess the power to enter summary judgments *sua sponte, so long as the losing party was on notice that she had to come forward with all of her evidence* ") (emphasis added) Under *Celotex*, it is submitted that the Second Circuit rule that actual notice "should" be provided, but need not be in all cases, is insufficient

In contrast to the permissive rule of the Second Circuit, the Eleventh Circuit properly requires that if the court is going to convert the 12(b)(6) to a summary judgment, express notice *must* be given

> It is within the judge's discretion to decide whether to consider matters outside of the pleadings that are presented to the court

> *Property Management & Investments, Inc v Lewis*, 752 F 2d 599, 604 (11th Cir 1985) However, if the judge does consider these outside matters, *i e*, if the judge does not exclude them, Rule 12(b) requires the judge to comply with the requirements of Rule 56 *Carter v Stanton*, 405 U S 669, 671, 92 S Ct 1232, 1234, 31 L Ed 2d 569, 572 (1972), *vacated on other grounds, sub nom Samkowski v Carter*, 416 U S 918, 94 S Ct 1916, 40 L Ed 2d 276 (1974) Rule 56 states, in relevant part, that a "motion [for summary judgment] shall be served at least 10 days before the time fixed for the hearing" Thus, the court must give the parties ten days notice that it is converting the moving party's motion to dismiss into a motion for summary judgment *Griffith v Wainwright*, 772 F 2d 822, 825 (11th Cir 1985) (and cases discussed therein)

Jones v The Automobile Insurance Company of Hartford, 917 F 2d 1528, 1531-2 (11th Cir 1990) *See also, Milburn v United States*, 734 F 2d 762, 766 (11th Cir 1984) ("'bright-line' test requiring 10-day advance notice that the court will take a motion for summary judgment under advisement as of a certain date"), *Finn v Gunter*, 722 F 2d 711, 713 (11th Cir 1984) ("This circuit has consistently upheld the strict notice requirements of rule [ ] 56(c)"), *Moore v State of Florida*, 703 F 2d 516, 519-20 (11th Cir 1983) ("Generally, 'the 10-day notice requirement of Rule 56(c) is strictly enforced'"), *Herron v Beck*, 693 F 2d

125, 126 (11th Cir 1982) (""ten-day notice requirement of Rule 56(c) is strictly enforced ") [1]

The same strict notice requirement is also followed by the Federal, the Third, the Fifth, the Eighth and the Tenth Circuits *See, Selva & Sons, Inc v Nina Footwear, Inc* , 705 F 2d 1316, 1322 (Fed Cir 1983) (when court converts Rule 12(b)(6) motion to motion for summary judgment, Rule 56 strictures of notice must be adhered to), *Davis Elliott International, Inc v Pan American Container Corp* , 705 F 2d 705, 707-08 (3d Cir 1983) (adopting rule of strict adherence to Rule 56 notice requirements when Rule 12(b)(6) motion is converted), *Estate of Smith v Tarrant County Hospital District*, 691 F 2d 207, 208 (5th Cir 1982) ("This circuit has consistently interpreted the terms of Rule 56 strictly and has refused to dispense with the procedural safeguards of notice and hearing "), *Underwood v Hunter*, 604 F 2d 367, 369 (5th Cir 1979) ("Subsequent cases have reaffirmed our adherence to

---

[1] The version of Rule 56 in effect at the time the district court converted the Rule 12(b)(6) motion to one under Rule 56 in the present case provided, in pertinent part "The motion must be served at least 10 days before the day set for the hearing " (Emphasis added) The portion of Rule 56(c) providing that "[t]The motion must be served at least 10 days before the day set for the hearing" has been amended in the current, 2010 version of Rule 56 to provide that "a party opposing the motion must file a response within 21 days after the motion is served " Rule 56(c) (2010) Accordingly, although the manner of counting days from the time the Rule 56 motion is "served" has been changed, the essential requirement that the nonmovant be given advance notice that a motion for summary judgment is pending against him or her to trigger the obligation to respond or the ability of the court to rule on the motion is common to both the 2008 version of Rule 56 and the current 2010 version

the strict notice and hearing requirements of Rules 12(b) and Rule 56 where the court sua sponte converts a 12(b)(6) motion into a summary judgment motion by considering matters outside the pleadings "), *Winfrey v Brewer*, 570 F 2d 761, 764 (8th Cir 1978) ("the required notice cannot be dispensed with merely because a motion to dismiss is treated as a motion for summary judgment"), *Adams v Campbell County School District*, 483 F 2d 1351, 1353 (10th Cir 1973) (noncompliance with ten day notice requirement of Rule 56 deprives court of authority to grant summary judgment)

Other Circuits have disparate holdings concerning whether conversion of Rule 12(b)(6) motions to motions for summary judgment requires notice Many, like the Second Circuit, do not provide a firm requirement of notice prior to conversion

The Fourth Circuit has held that if a party is 'aware' that material outside the pleadings is before the court, that is sufficient *Gay v Wall*, 761 F 2d 175 (4th Cir 1985) In the Sixth Circuit, whether a district court must provide actual notice that it intends to convert a motion to dismiss into a motion for summary judgment depends on the facts and circumstances of each case, where one party is likely to be surprised by the proceedings, notice is required *Shelby County Health Care Corp v Southern Council of Indus Workers*, 203 F 3d 926 (6th Cir 2000) In the Ninth Circuit, *Portland Retail Druggists Assn v Kaiser Foundation Health Plan*, 662 F 2d 641 (9th Cir 1981), simply being aware that "specific papers" were filed and having a reasonable opportunity to respond was sufficient Explicit notice of a *sua sponte* summary judgment is only required when the nonmoving party

is appearing *pro se* *Garaux v Pulley*, 739 F 2d 437, 439-40 (9th Cir 1984)

It is respectfully submitted that only the Majority "bright line" rule – requiring ten days notice in all cases -- complies with the language of Rule 56(c), the requirements of Due Process to provide notice and an opportunity to be heard, and is consistent with this Court's holding in *Celotex Corp v Catrett*, 477 U S 317, 106 S Ct 2548

In the present case, the failure to accord Petitioners the notice required by Rule 56(c), prior to conversion of the Rule 12(b)(6) motion to one for summary judgment under Rule 56, and the simultaneous grant of summary judgment was not harmless In particular, after briefing on Rule 12(b)(6) motion was closed and one day after the district court's December 3, 2009, grant of summary judgment, which occurred simultaneously with the district court's conversion of the Rule 12(b)(6) motion to a Rule 56 summary judgment motion, the following statement by NBC's Tim Kring – the supposed "creator" of "Heroes," was posted on the internet Mr Kring stated, in part, the following about how he "created" "Heroes"

> In Hollywood they say if Hitler wrote a great screenplay they'd send a limo to the airport to pick him up -Great creativity comes from everywhere, I was flubbed [before] and I didn't just want a show on the air, I wanted something big, bold, and wanted to prove them wrong Only problem was I didn't have an idea, so I was just left angry and worried about it I lied and cheated and schemed and manipulated all the way through the idiocy that is the notes

> process when you do this, was able to push the production through relatively unscathed and in the form that it would work in That's how Heroes got on the air It's not the most original idea in the world, you build and borrow Just put these pieces together in the right way, at the right time, and on the right network

Statement by Tim Kring – NBC's "creator" of "Heroes," (posted on internet December 4, 2007), Appendix O to Petition for Certiorari (http //blog the-eg com/2007/12/04/tim-kring/)

It is respectfully submitted that the foregoing admissions by Mr Kring, including that that he "lied, cheated and schemed and manipulated" to "create" the accused "Heroes" show would have been sufficient to defeat summary judgment Had the district court followed the requirement of Rule 56(c) to give ten days notice, the foregoing admissions by Mr Kring would have been available to Petitioners during that ten days period

Rule 56 includes other safeguards that were denied to Petitioners because of the lack of notice that the Rule 12(b)(6) motion was, in fact, being converted to a Rule 56 motion for summary judgment until judgment was already rendered For example, Rule 56(f) provides that

> "(f) When Affidavits Are Unavailable
>
> If a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may

(1) deny the motion,

(2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or

(3) issue any other just order

With the safeguards afforded by Rule 56(f), Petitioner would have had the right to request a continuance to permit it time to take Mr Kring's deposition, and others, and to secure any other affidavits or other evidence deemed necessary to respond Petitioners were unable to do so, however, because the conversion of the Rule 12(b)(6) motion to one for summary judgment occurred simultaneously with grant of summary judgment, without any prior notice

In addition, had Petitioners' been accorded the ten days notice required by Rule 56(c), a strict requirement in the Majority but not in the Second Circuit, Petitioner's could also have sought to introduce expert testimony by Ms Joann Vara, whose statement appears in the Appendix B to Petitioners' reply in support of Petitioners' petition for certiorari As a professional in the field of "Clearance," Ms Vara is an expert in knowing what "ordinary observers" (i e , the viewing audience) consider "substantially similar" so that such "substantial similarity" will be avoided Such expert testimony would have been material evidence in opposing the motion for summary judgment *Three Boys Music Corp v Bolton*, 212 F 3d 477, 485 (9th Cir 2000) ("The objective-extrinsic test requires analytical dissection of a work and expert testimony ")

In such expert testimony, Ms Vara could have expressed her view as an expert in television production and as a person engaged in the profession of ensuring that her employer avoids infringement, that the degree of similarity between "Heroes" and Plaintiffs' copyrighted works is "unheard of in production [of television series of a major network] and should never have been permitted" by NBCU's "Clearance" department (Appendix B to Petitioners' reply in support of petition for certiorari)

Ms Vara could also have testified about real-life facts that also demonstrate "substantial similarity." In particular, she states that since the running of the "Heroes" television series accused of infringement (with its heroine-addicted "artist that paints the future" to try to warn others), the real-life Plaintiff (who does not use drugs) is now asked in the free lectures he gives to young students whether "they need to shoot heroin to paint the future like the artist on 'Heroes'" Those questions by the young students demonstrates that real-life "lay observers" see the connection between Plaintiffs' "artist that paints the future" and Defendants' "artist that paints the future," further evidence that would have weighed in favor of infringement and against grant of summary judgment Plaintiffs had no fair opportunity to present this, and other evidence and testimony, because of the absence of prior notice that the Rule 12(b)(6) motion was to be converted to a Rule 56 motion for summary judgment

Accordingly, the district court's failure to provide the 10 days notice required by Rule 56(c) prior to conversion of the Rule 12(b)(6) motion to a Rule 56 motion, uncorrected by the Second Circuit Court of Appeals, was serious error, and not harmless, since the

lack of fair notice effectively precluded Plaintiffs from presenting material and relevant evidence that would have been appropriate in opposing a motion for summary judgment and would likely have changed the result This would not have occurred if the mandatory notice required by the Majority of circuits had been applied, rather than the permissive notice of the Second Circuit

This Court may take judicial notice that Rule 12(b)(6) motions are filed in most lawsuits filed in federal court, many of which are accompanied by materials outside the pleadings Thus, the issue of whether the motion may be converted to a Rule 56 motion for summary judgment is routine for all types of cases It is therefore is important to have a nationwide rule

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Supreme Court grant rehearing to resolve this split in the Circuits, in favor of the mandatory notice applied by the Eleventh Circuit

Respectfully submitted,

Theodore F Shiells
Counsel of Record
CARR LLP
900 Jackson Street No 670
Dallas, Texas 75202
(214) 760-3032
tshiells@Carrip com

Counsel for Petitioners
Clifton Mallery a/k/a
Enjai Omaa Eele,
Amnau Karam Eele

CERTIFICATION OF COUNSEL

As required by Supreme Court Rule 44 2, I certify that this Petition for Rehearing of Order Denying Petition for Writ of Certiorari is limited to substantial grounds not previously presented and is presented in good faith and not for delay

May 21, 2010

Theodore F Shiells/mrc
Theodore F Shiells
Counsel of Record
CARR LLP
900 Jackson Street No 670
Dallas, Texas 75202
(214) 760-3032
tshiells@Carrip com

Counsel for Petitioners
Clifton Mallery a/k/a
Enjai Omaa Eele,
Amnau Karam Eele